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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 9

No. 529 12

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, ET AL., APPELLANTS,

vs.

RAY L. RILEY, AS STATE CONTROLLER OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE NORTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 5, 1928

(33,838)

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INDEX

	Original	Print
Record from the district court of the United States, Northern California	1	1
Bill of complaint	1	1
Motion for interlocutory injunction	12	11
Affidavit of William J. Finn	13	11
Order to show cause	15	13
Stipulation to continue hearing..(omitted in printing)..	17	
Order continuing hearing.....(omitted in printing)..	18	
Order setting cause for hearing	19	14
Motion to dismiss	20	14
Affidavit of service	22	15
Order denying injunction and granting motion to dismiss.	23	16
Petition for appeal and order allowing same	24	17
Assignments of error	25	17
Bond on appeal.....(omitted in printing)..	27	
Præcipe for transcript of record (" " ")..	31	
Clerk's certificate.....(" " ")..	32	
Citation and service.....(" " ")..	33	
Statement of points to be relied upon and designation of parts of record to be printed	34	18

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[fols. a-1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

No. 2161 K. In Equity

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, C. J. Ross, J. J. Croundley, O. H. Beil, S. L. Beer, Wm. J. Aspe, J. Webster, J. Van Aken, R. Torly, J. E. Cox, J. F. Kimball, A. G. Meitner, I. O. Boldt, Paul J. Freson, Wm. Henry, Joseph Kramer, M. J. Brady, M. Larrov, C. J. Lucan, J. Powell, W. A. Anderson, Z. D. Tallman, W. T. Mugg, J. Anderson, Mario Caldera, P. Barale, Wm. Kessler, W. Buntain, N. Schiller, H. Korbus, E. Korbus, F. Sorsin, C. A. Fuller, H. J. Wilken, F. P. Brutler, E. Boyd, Geo. V. Malloy, Rolf K. Evans, S. W. Spencer, W. E. Woodall, R. E. Paton, Chas. Vair, V. J. Consigben, R. G. Snow, Geo. E. Dixon, L. E. Walf, M. Geo. Sacco, Al. Brian, Frank D. Marty, H. Hession, B. J. O'Sullivan, E. J. Cassidy, Toney MacGinley, Wm. M. McGlinsky, E. G. McNaughton, E. W. Hill, and Wm. Leggott, Plaintiffs,

vs.

RAY L. RILEY, as State Controller of State of California, Defendant

BILL OF COMPLAINT—Filed Aug. 4, 1928

[fol. 2] To the Honorable Judges of the District Court of the United States for the Northern District of California, sitting in equity:

Geo. B. Williams, William J. Finn, M. L. Myers, C. J. Ross, J. J. Croundley, O. H. Bell, S. L. Beer, Wm. S. Aspe, J. Webster, J. Van Aken, R. Torley, J. E. Cox, J. F. Kimball, A. G. Meitner, I. O. Boldt, Paul J. Freson, Wm. Henry, Joseph Kramer, M. J. Brady, M. Larrov, C. J. Lucan, J. Powell, W. A. Anderson, Z. D. Tallman, W. T. Mugg, J. Anderson, Mario Caldera, P. Barale, Wm. Kessler, W. Buntain, N. Schiller, H. Korbus, E. Korbus, F. Sorsin, C. A. Fuller, H. J. Wilken, F. P. Brutler, E. Boyd, Geo. W. Mal-

loy Rolf K. Evans, S. W. Spencer, W. E. Woodall, R. E. Paton, Chas. Vair, V. J. Consigben, R. G. Snow, Geo. E. Dixon, L. E. Wolf,, M. Geo. Sacco, Al. Brian, Frank D. Marty, H. Hession, B. J. O'Sullivan, E. J. Cassidy, Toney MacGinley, Wm. M. McGlinsky, E. G. McNaughton, E. W. Hill and Wm. Leggott bring this Bill of Complaint, on behalf of themselves, as well as on behalf of all other persons, firms, associations and corporations similarly interested or situated and entitled to receive the benefits herein, against Ray L. Riley, State Controller of the State of California, Defendant; and thereupon Plaintiffs complain of the said Ray L. Riley, State Controller of the State of California, Defendant, and show unto your Honors as follows:

[fol. 3] I

That the said defendant Ray L. Riley has been for many years last past and is now the duly elected, qualified and acting State Controller of the State of California, residing at Sacramento.

II

That Congress on July 11, 1916, duly enacted an Act entitled:

"An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." Chap. 241, 39 Stat. at L. 355.

In order to receive the said Federal aid provided for in said Act, the State of California enacted a law which provided that said State assented to and agreed to abide by all of the provisions of said Federal Act. Such law was entitled:

"An act expressing assent of the State of California to the provisions of the act of Congress approved July 11, 1916, entitled 'An act to provide*d* that the United States shall aid the states in the construction of rural post roads, and for other purposes.'"

Such State Law was enacted in the year 1917, being Chap. 29. Such law is referred to and made a part hereof the same as if set out in full.

That Congress amended and supplemented the said Act of July 11, 1916 by an Act entitled:

"An Act to amend the act entitled 'An Act to providee that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented and for other purposes."

Such act was passed on November 9, 1921, being Chap. 119, 42 Stat. at L. 212.

Both of said Federal Acts are now in full force and effect. That said Federal Acts provide, as follows:

"That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds."

Further, the following terms were set out in said Acts, to-wit:

"The term 'Construction' means the supervising, inspecting, actual building, and all expenses incidental to the construction of a highway, excepting locating, surveying, mapping, and costs of rights of way."

[fol. 4] Again:

"The term 'reconstruction means a widening or a rebuilding of the highway or any portion thereof to make it a contunuous road, and of sufficient width and strength to care adequately for traffic needs."

All of the moneys appropriated to the States was for construction and reconstruction, but not for maintenance and repair of said highways. The State of California agreed to, at its own cost, maintain and repair said highways, and failing so to do, after notice, the Secretary of Agriculture shall proceed to have such highways placed in a proper condition of maintenance and charge the cost against the Federal fund allotted to said State.

That under said Federal Acts the Government has appropriated and paid over to the State of California many millions of dollars and the State has received the same. The government has and is now appropriating moneys to

the said State, and said State will receive the same, all under the said provisions of said Federal Acts adopted by said State as aforesaid.

All of the highways of the State of California are post roads, and the public highways of said State are covered by the said provisions of said Acts, as aforesaid.

III

The State of California duly adopted a Constitution and the following provisions are found:

Art. IV, Sec. 22:

"No money shall be drawn from the treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the Controller; and no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation etc."

Art. IV, Sec. 24:

"Every act shall embrace but one subject, which shall be expressed in its title. • • • No law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be reenacted and published at length as revised or amended;"

Art. IV, Sec. 25:

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

• • • • • • •

[fol. 5] Tenth. For the assessment or collection of taxes. • • •

Fifteenth. Refunding money paid into the State Treasury.

• • • • • • •

Nineteenth. Granting to any corporation, association, or individual any special or exclusive right, privilege or immunity.

Twentieth. Exempt property from taxation."

Art. IV, Sec. 31:

The legislature shall have no power to give or to lend, or to authorize the giving or lending, of credit of the state

* * *, in aid of or to any person, association, or corporation, * * *, nor shall it have power to make any gift of any public money or thing of value to any individual, etc., whatsoever. * * *."

The above provisions of said Constitution were adopted prior to the year 1917 and are now in full force and effect. Said provisions are referred to and made a part hereof the same as if set out in full.

IV

That in the year 1923 the State of California duly enacted a law entitled:

"An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith." Chap. 267, Laws 1923.

The above law was amended on May 23, 1925, by amending Sections 4, 7, 10, 11 and 14 and an additional section 18. Chap. 359, Laws 1925.

In the year 1927, sections 10, 11 and 12 of the above law were amended. Chap. 716, Laws 1927.

The State in 1927 enacted the following law:

"An act to provide for the acquisition of rights of way for and the construction, maintenance and improvement of state highways, classifying the highways in the state system and allocating and directing the expenditures of funds for construction, maintenance and improvement of the state highways. Chap. 794, Laws 1927.

In the year 1927 the State duly enacted the following law, entitled:

[fol. 6] "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, and adopting those provisions,

not inconsistent herewith, of an act entitled, "An act to regulate and license the business of producing, refining and distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith," approved May 30, 1923, as amended and approved May 23, 1925." Chap. 795, Laws of 1927.

Such above laws are referred to herein and made a part hereof as if the same are set out in full.

The District Court of Appeals, Third District, California, interpreted the provisions of the said law of 1923, Chap. 267, which interpretation was sustained by the Supreme Court of the State.

Said decision is found in 242 Pac. 749, under the title of Old Homestead Bakery, Inc., v. Marsh. Such decision is referred to herein and made a part hereof as if the same is set out in full.

The plaintiffs allege that the said amendments to said original laws do not change or modify the said interpretation of said law, as aforesaid.

The plaintiffs allege that the above State Laws are construed with the Motor Vehicle Law so as to raise revenue in the nature of compensation for the damage done to the highways by said motor propelled vehicles; and that by reason of the provisions for refunds the plaintiffs, as well as all other firms, persons, associations and corporations similarly interested or situated, pay in advance said exactions under the above named laws solely for the purpose of using their motor propelled vehicles on the public highways of the State, namely, a "toll" for such use; that the said distributors do not pay one cent to the State Controller such exactions, but said distributors collect all the moneys from all the consumers of said motor vehicle fuels; that said distributors keep one per cent of all moneys so collected and do not pay over to said State Controller the entire amount so collected and said one per cent is a gift [fol. 7] to said distributors; that said distributors receive the benefit of the use of the moneys which they have collected during the said periods plus an additional 45 days, and said distributors have received such benefits from the

use of said moneys so collected from all the consumers; that the defendant has and wi" in the future pay over to the said distributors and consumers exempted by said above laws, as refunds, many hundreds of thousands of dollars at a loss of one per cent as aforesaid, as the defendant had only collected Ninety-nine (99) percentum of the amounts paid as refunds, and said procedure has benefited not only the said distributors but also said exempted consumers in the said amount of one percentum, at the loss of said State; that the amounts so collected as aforesaid, are divided between the State and the Counties in the State, and no portion of said moneys are paid over to the municipalities of the State who must raise revenue for the purpose of constructing or reconstructing, or maintaining and repair the streets in such municipalities by assessments and taxes; that all of said moneys so collected is used for the purpose of constructing or reconstructing said highways of the State, and also to maintain and repair the same.

V

That the plaintiffs, as well as many thousands of persons, firms, associations and corporations, are taxpayers in this State and have for some years and are now operating motor propelled vehicles on the public highways of this State and must pay in advance said motor vehicle fuel exaction before operating on said Federal aided highways, and said exactions are not a part of the price of said fuel but are in addition to the purchase price.

The plaintiffs, as well as said other persons, firms, associations and corporations, have been and will in the future pay said exactions under said State laws, for the sole purpose of using the said public highways of the State by their said motor vehicles and such exaction is a "toll' and the cost per mile of said use depends upon the size and weight
5 [fol. 8] of said vehicles; that said plaintiffs, as well as all other persons, firms, associations and corporations, are compelled to and have and will in the future pay taxes and assessments for the construction or reconstruction, the maintenance and repair of the streets of the municipalities of the State, that said plaintiffs have been informed, believe and charge the fact to be that about forty (40) per centum of all of the moneys received by the said defendant under

the provisions of said State laws are an exaction as compensation for the use of public highways outside of the municipalities of the State, and the remainder thereof is an exaction for the use of the streets within the municipalities of the State, and all the moneys so exacted and received by the defendant are expended solely upon the public highways of the State outside of the limits of the municipalities, and the said municipalities and these plaintiffs and all other persons, firms, associations and corporation, as taxpayers, receive no benefits whatsoever from such exactions and payments.

VI

That said defendant, solely under color of his said office as State Controller, has for years and will continue to demand and collect said illegal exaction under the provisions of said State laws from those plaintiffs and all other persons, firms, associations similarly interested or situated; that said defendant will in the future collect under such State laws many thousands of dollars daily; that said defendant has received and has in his hands the tax roll, as provided for by said laws, during the said period from March 31, 1928 to July 1, 1928, and has demanded from said distributors the amount of money shown by said tax roll, to-wit, about $8,477,293.00; and further, the said defendant has paid out during the same period about $800,000.00, as refunds under said State laws.

That said defendant, after having received said moneys, will immediately distribute said moneys, as provided for [fol. 9] in said State laws, and no portion of said moneys will be distributed or apportioned to the said municipalities of said State.

That the said illegal acts of said defendant, acting under said unconstitutional laws of the State, have and will continue to obstruct, tend to obstruct, hinder, impair and impede the unrestricted and vested passage, use and operation of said motor vehicles owners or operated by said plaintiffs and all other persons, firms, associations or corporations similarly interested or situated, on the said Federal aided highways, as aforesaid, and the streets within the limits of the said municipalities of the State, to the irreparable loss, damage and injury to said plaintiffs and all

other persons, firms, associations and corporations similarly interested or situated, unless restrained by the order of this Court.

VII

That the provisions of said unconstitutional laws of the State, as aforesaid, being Chapter 267 Laws of 1923, Chapter 359 Laws of 1925, Chapters 716, 795, Laws of 1927, and the said illegal acts of said defendant, Ray L. Riley, in enforcing the provisions of said illegal State Laws, as aforesaid, were and are void and unconstitutional, being contrary to and in violation of the Constitution of the United States, especially the 14th Amendment thereof, and further, being contrary to and in violation of the said Federal Aid Legislation, being Chapter 241, 39 Stat. at L. 355, and Chapter 119, 42 Stat. at L. 212 and said contract entered into by the said State of California, being Chapter 29 Laws of 1917, and further, contrary to and in violation of the Constitution of the State of California, the protection of all of which these plaintiffs and all other persons, firms, associations and corporations similarly interested and situated pray.

VIII

The premises considered these plaintiffs and all other persons, firms, associations and corporations, similarly in-
[fol. 10] terested and situated have no plain, adequate and complete remedy at law.

IX

That the matters involved in this controversy exceed in value the sum of Three thousans (3,000) dollars, exclusive of interest and costs.

X

For as much as these plaintiffs and all other persons, firms, associations and corporations similarly interested and situated, can have no adequate relief except in this court and to the end that the defendant may, if he can, show why the plaintiffs and all other persons, firms, associations and corporations similarly interested or situated

should have the relief herein prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of his knowledge, information and belief, full, true, direct and perfect answer make to the matters in this bill of complaint hereinbefore stated, but not under oath, an answer under oath being especially waived, and the plaintiffs, on behalf of themselves as well as on behalf of all other persons, firms, associations and corporations similarly interested or situated, who are entitled to the benefits herein, pray that a temporary injunction be granted restraining and enjoining the defendant Ray L. Riley, as State Controller, as aforesaid, from in any way or manner disbursing, using, apportioning or expending any of the moneys which have been or will be received by him as collections from March 31, 1928, from said distributors under the provisions of said State laws, and said defendant is directed and commended to safeguard and keep all moneys received from said collections after March 31, 1928, in a separate fund intact, so as to turn over all of said moneys so collected as aforesaid, awaiting for a final decree in the above cause, and the plaintiffs pray that this Court proceed to call in two other Judges of this court, one of whom to be a Circuit Judge, for the purpose of hear-[fol. 11] ing and determining the application for the said temporary injunction as prayed for herein, under the provisions of Section 266, as amended, of the Judicial Code, and the plaintiffs pray upon the final hearing of this cause before said Court consisting of Three Judges for a decree declaring the said State laws, being Chapter 267 Laws of 1923, Chapter 359 Laws of 1925, and Chapters 716 and 795 Laws of 1927, are void and unconstitutional, and that the said Ray L. Riley, Defendant, be forever enjoined and permanently restrained from enforcing the said provisions of said illegal, void and unconstitutional State laws, and the plaintiffs further pray that a decree be entered commanding and directing the said Ray L. Riley, defendant, to immediately pay over to the registry of this Court all of the said moneys which have been received by said defendant under the provisions of said illegal, void and unconstitutional State laws since March 31, 1928, and the plaintiffs pray for such allowances, distributions and payments as the Court may hereafter determine, award and decree; and for all other, proper and further relief as may be just and

equitable in the premises, and further for the costs and disbursements herein expended.

W. R. Crawford, Solicitor for Plaintiffs.
Address: 325 Lumber Ex. Bldg., Seattle, Wash.

Duly sworn to by Geo. B. Williams. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR AN INTERLOCUTORY INJUNCTION

Come now the plaintiffs in the above entitled cause and move this Court for the issuing of an interlucutory injunction, until the final determination of said cause; and the plaintiffs request this Court will call in two other Judges, one of whom shall be a Circuit Judge, under the provisions of Section 266, as amended, of the Judicial Code, so as to hear and determine said motion for said interlocutory injunction, as the constitutionality of the statutes of the State of California and the acts of the said Ray L. Riley, defendant, as State Controller of the State of California, in enforcing said State statutes are involved in this action, and further, that said Court, consisting of three Judges, shall finally hear and determine such action.

Said motion is based upon the records and files in this cause and the said affidavit attached to this motion.

W. R. Crawford, Solicitor for Plaintiffs.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLIAM J. FINN—Filed Aug. 4, 1928

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

William J. Finn, first being duly sworn upon oath, deposes and says: That he is one of the Plaintiffs in the above entitled cause; that he has for many years and is now the

owner and operator of motor-propelled vehicles, using the public highways of the State of California, including the streets, avenues and roads within the limits of municipalities; that he is now and has been the owner of real estate in the City of Los Angeles, State of California, and has paid taxes on such real estate and also on personal property in said city; that he has been informed, believes, and charges the fact to be that said taxes paid by him in said city into the general fund, and the streets, avenues and roads within said city are maintained and repaired out of said general fund, and that the said exactions under the said motor vehicle laws do not furnish any funds to maintain and repair the streets, avenues and roads, not only in said Los Angeles, but also in all other municipalities in the State, as the moneys received from said State laws never reach any of said municipalities, but said moneys are divided between the State and the Counties; that this affiant has been informed, believes and charges the fact to be that the said Defendant has paid out money for refunds after the period in which he had received said collections under [fol. 14] said laws, and the consumer had paid to the said distributors prior to the said period mentioned above; that said Defendant will disburse and turn over to the fund created by the law, and said Defendant will lose control and possession of all of the moneys which he is now collecting from said distributors, since the 31st day of March, 1928, unless enjoined by this Court; that this affiant, as well as the other Plaintiffs and all other persons, firms, associations, and corporations similarly interested and situated, will not be able to recover back any of said moneys if the said Defendant is permitted to lose the control and possession of said moneys so collected under said State laws, and they will be irreparably damaged and their moneys lost.

William J. Finn.

Subscribed and sworn to before me this 3rd day of August, 1928. Nina C. Putnam, Notary Public in and for the City and County of San Francisco, State of California. My commission expires April 1, 1931. (Seal.)

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed Aug. 4, 1928

It appearing to the Court from the motion for an interlocutory injunction and the affidavit attached thereto; and from the bill of complaint filed herein that the constitutionalty of the statutes of the State of California and the acts of the defendant Ray L. Riley, as State Controller of the State of California, in enforcing the provisions of said statutes are involved in this action; also the plaintiffs have prayed for an interlocutory injunction restraining the enforcement of the said statutes and the acts of the said defendants during the pendency of this action and until the final hearing and determination thereof; and it further appearing that the plaintiffs have moved the Court for said interlocutory injunction based upon the records and files in this cause and the affidavits attached to said motion; the Court being fully advised in the premises, it is

Considered, ordered, adjudged, and decreed that the said Ray L. Riley, defendant, as State Controller of the State of California, show cause, if any he has, before a Session of this Court, consisting of three Judges thereof, one being a Circuit Judge, at Ten (10:00) o'clock A. M. on the 13 day of August, 1928, at the Court Room of this Court in the Federal Building in the City of San Francisco, California, why an interlocutory injunction should not issue as prayed for in the complaint and moved for by the plaintiffs; and [fols. 16-18] further, the said plaintiffs shall forthwith serve copies of the bill of complaint, the motion for an interlocutory injunction with the affidavit attached thereto and the order entered herein upon the said Ray L. Riley, defendant, as State Controller of the State of California, and serve a notice accompanied by copies of the bill of complaint, the motion for an interlocutory injunction with the affidavit attached thereto and the order entered herein upon the said Governor of the State of California and the said Attorney General of the State of California.

Enter:

Wm. H. Hunt, Judge.

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER SETTING CAUSE FOR HEARING—Filed Sept. 8, 1928

It appearing that the parties herein did enter into and file a certain stipulation, and an order was entered continuing the hearing on the order to show cause why an interlocutory injunction should not be granted against the Defendant, and by said order continuing said hearing it was provided that the Court will thereafter fix the time and place for a hearing on said order to show cause, and that the Defendant has now served a Motion to Dismiss the Bill of Complaint filed herein, and the Court being fully advised in the premises it is

Ordered that the Court, consisting of three judges, one being a Circuit Judge, will hear, on September 27th, 1928, at the hour of 2 P. M. o'clock, in the Federal Building in San Francisco, the said Order to Show Cause why an interlocutory injunction should not be granted against the Defendant, and further the Motion to Dismiss the Bill of Complaint filed herein.

Dated September 8th, 1928.

Frank H. Kerrigan, Judge.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes Ray L. Riley, as State Controller of the State of California, named as defendant in the above entitled proceeding and moves the above entitled court to dismiss the bill of complaint filed herein on the following grounds:

I

That said bill of complaint does not state facts sufficient to constitute a cause of action against said defendant, or to entitle complainants, or any of them, to the whole or any part of the relief prayed for in said bill.

II

That this court has no jurisdiction of the subject of this proceeding, or of the above named defendant, or of the State of California.

III

That there is a defect of parties plaintiff in that the several plaintiffs are not properly joined.

[fol. 21]

IV

That there is a misjoinder of parties plaintiff in that the plaintiffs are not properly joined.

V

That several alleged causes of action have been improperly united.

VI

That complainants have not, and no one of them has, legal capacity to sue defendant.

This motion is also based upon the said bill of complaint, the notice of motion and upon all of the papers and records on file in the above entitled proceeding.

Dated September 20, 1928.

U. S. Webb, Attorney General of California; Frank L. Guerena, Deputy Attorney General, Attorneys for Defendant, Ray L. Riley, as State Controller of the State of California.

[fol. 22] In United States District Court

[Title omitted]

Affidavit of Service by Mail—Filed Sept. 26, 1928

State of California,
City and County of San Francisco, ss:

Virginia Rae, being duly sworn, deposes and says: That she is a citizen of the United States, over the age of eighteen

years, and is not a party to this action, and that she resides at the City and County of San Francisco, State of California; that W. R. Crawford, is the attorney of record of the above-named plaintiff in said cause, and that he resides at 625 North Elm Drive, Beverly Hills, in the County of Los Angeles, State of California; and that in each of said two places there is a United States Post Office, and between said two places there is a regular daily communication by mail; that on the 22nd day of September, 1928, deponent served a true copy of Motion to Dismiss Bill of Complaint and Notice of Hearing Thereon herein, of which this is the original, on said last-named W. R. Crawford, attorney of record, by depositing such copy aforesaid on said date in the post office at the City and County of San Francisco, aforesaid, enclosed in a sealed envelope, addressed to said W. R. Crawford, at 625 North Elm Drive place of Beverly Hills, Calif., and prepaying the postage thereon. And deponent further sayeth not.

Virginia Rae.

Subscribed and sworn to before me this 22nd day of September, 1928. Marguerite Gallagher, Steno. to Attorney General.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

Equity. No. 2161

GEORGE B. WILLIAMS et al.

vs.

RAY L. RILEY, etc.

ORDER DENYING INTERLOCUTORY INJUNCTION AND DISMISSING BILL OF COMPLAINT—Sept. 28, 1928

In this case the application for an interlocutory injunction and the motion to dismiss the Bill of Complaint, heretofore argued and submitted, being now fully considered, it is ordered that said Application for an injunction be and the same is hereby denied, and that the motion to dismiss, be and the same is hereby granted.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Oct. 15, 1928

The above named Plaintiffs, conceiving themselves aggrieved by the order and decree made and entered on the 28th day of September, 1928, in the above entitled action, do hereby appeal from the said order and decree to the Supreme Court of the United States for the reasons specified in the Assignment of Error, which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers, upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 15th day of October, 1928.

W. R. Crawford, Solicitor for Plaintiffs.

The foregoing Appeal is allowed upon the filing of a proper bond in the amount of $250.00 dollars.

Frank H. Kerrigan, District Judge. Wm. H. Hunt, Circuit Judge. A. F. St. Sure, D. J.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERROR—Filed Oct. 15, 1928

And now, on this 15th day of October, 1928, came the plaintiffs by their solicitor W. R. Crawford, and say that the order entered in the above cause of the 28th day of September, 1928, denying the application for an interlucutory injunction against the defendant herein, is erroneous and unjust to plaintiffs:

Because the Court erred in refusing and denying the application for on interlocutory injunction against Ray L. Riley, as State Controller, the defendant herein.

And further, and now, on this 15th day of October, 1928, came the plaintiffs by their solicitor W. R. Crawford, and say that the order and decree entered in the above cause

on the 28th day of September, 1928, granting the motion to dismiss the bill of complaint in said cause and dismissing the said bill of complaint, is erroneous and unjust to the plaintiffs:

First. Because the Court erred in granting the said motion to dismiss the said bill of complaint, and,

Second. Because the Court erred in dismissing the bill of complaint.

Wherefore the plaintiffs pray that the said order refusing the application for said interlocutory injunction be reversed; and further that the said order and decree en-
[fols. 26-32] tered in said cause granting the motion to dismiss and dismissing the bill of complaint be reversed; and further that the District Court be instructed and directed to enter a decree as prayed for in said bill of complaint; and for such proper relief as the plaintiffs are entitled to and as the nature of the cause demands.

W. R. Crawford, Solicitor for Plaintiffs.

[File endorsement omitted.]

[fol. 33] Citation, in usual form, showing service on U. S. Webb et al., omitted in printing.

[fol. 34] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 13, 1928

The Appellants request the Clerk to file the points relied upon and to print the following parts of the record.

Points Relied Upon

I

Congress enacted the Post Road Act on July, 1916 under the provisions of Article I, sec. 8 of the Constitution, and the same was amended and supplemented on November 9, 1921. The State of California by proper statute agreed to and to abide with all the provisions of said Federal Aid Legislation. Such action of said State became a contract, and the appellants (plaintiffs) and all others similarly in-

terested or situated are entitled to enjoy all of the benefits accruing under said provisions of said Federal Aid Legislation.

II

All highways in the State are post roads, and said highways have been or are now being constructed or reconstructed under the said federal aid, as provided by said [fol. 35] Federal Aid Legislation, so adopted by said State. The Federal Government has already paid over to said State, who has received the same, many millions of dollars, and is obligated in the future to pay many millions of dollars to said State.

III

The said State enacted the following laws, to wit; Chapter 267, Laws of 1923, amended by Chapter 359, Laws of 1925, and amended by Chapter 716, Laws of 1927, and amended by Chapter 795, Laws of 1927. Under the provisions of said State Laws, the State has compelled the said Appellants and all others to pay in advance 3 cents per gallon of the motor vehicle fuel before the said highways cane be used by motor propelled vehicles. That such charge is a "toll." Such State Laws are contrary to and in violation of the provisions of said Federal Aid Legislation granting these Appellants and all others similarly interested or situated the use of said highways without the exaction of a "toll," the protection of said Federal Aid Legislation was prayed for.

IV

The Appellants and all others similarly interested or situated claim that said State Laws giving to some one per cent of all moneys collected and denying others the same privilege, are invalid and void, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution, and also the Constitution of the State of California.

V

The Appellants, who are tax payers, and all others similarly interested or situated claim that said State Laws in taking the moneys and properties of the Appellants and all others similarly interested or situated under the guise

of taxes for private purposes, violates the due process of law clauses in the Federal Constitution, especially the Fourteenth Amendment thereof, and also the provisions of the Constitution of California.

[fol. 36] VI

The Appellants, as tax payers, as well as users of said highways, and all others similarly interested or situated claim that the provisions of said State Laws, requiring the State Controller to pay to any person who uses motor vehicle fuel for any purpose other than operating motor propelled vehicles on the highways, and on which the exaction imposed by the said State Laws has been paid in advance, 3 cents on each gallon of said motor vehicle fuel so used, regardless of whether such person has paid the exaction himself or indirectly, are contrary to and in violation of the Constitution of the State of California, as such refunds are gifts from the public treasury to such users receiving such refunds.

VII

The Appellants, who are tax payers and users of said highways and all others similarly interested or situated claim that the provisions of said State Laws, requiring the State Controller to pay to any person who uses motor vehicle fuel for any purposes other than for the use of the highways by motor propelled vehicles as well as any person exempted by said Laws, and which the exaction imposed by the said State Laws, has been paid, 3 cents on each gallon of said motor vehicle fuel so used, regardless of whether such person has paid said exaction himself directly or indirectly, are invalid, as taxing the Appellants, as tax payers, as well as users of the highways, and all other similarly interested or situated to raise funds to provide gifts to such consumers who have received said refunds, thereby depriving them of their moneys and properties without due process of law contrary to and in violation of the Federal Constitution, especially the Fourteenth Amendment thereof, and also the Constitution of the State of California.

IX

The Appellants, tax payers and users of the highways, and all others similarly interested or situated, claim that

the provisions of said State Laws, requiring the State Controller to pay said refunds of 3 cents on each gallon of said [fol. 37] motor vehicle fuel although said State Controller has never collected said 3 cents but only 99 per cent thereof, as the distributors kept the 1 per cent for their own use, are invalid as the Appellants and all others similarly interested or situated are deprived of their properties and moneys without due process of law contrary to and in violation of the Federal Constitution, especially the Fourteenth Amendment thereof, and also the Constitution of California.

X

The Appellants, as tax payers and users of the highways, and all others similarly interested or situated, claim that under the provisions of said State Laws all of the moneys are collected from the use of all the highways, but no portion of said moneys is expended upon the highways within the limits of the municipalities of the State, and therefore said provisions are invalid, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution, and also the Constitution of California.

XI

The Appellants, as tax payers and users of the highways, and all others similarly interested or situated claim that the said provisions of the said State Laws are invalid, and such invalidity of said provisions renders the whole of said State Laws unconstitutional and void, being contrary to and in violation of the Federal Constitution, especially the Fourteenth Amendment thereof, and further the Constitution of the State of California, the protecion of all of which the Appellants and all others similarly interested or situated is prayed.

XII

The Appellants and all other similarly interested or situated claim that the said provisions of said State Laws are invalid as the said provisions are not embraced within the titles of said State Laws, contrary to and in violation of the Constitution of California.

[fol. 38]

XIII

The Appellants claim that this action was instituted under Section 24, especially the 14th paragraph thereof, of

the Judicial Court, and on behalf of themselves but also on behalf of all persons, firms, associations and corporations similarly interested or situated, and entitled to receive to the benefits herein.

XIV

The lower Court erred in denying the application for an interloctuory injunction.

XV

The lower Court erred in granting the motion to dimsiss the bill of complaint.

XVI

The lower court erred in failing and refusing to file a written opinion in denying the application for an interlocutory injunction and granting the motion to dismiss the bill of complaint, although the Appellants requested the same.

XVII

Upon filing said action, the Appellants moved for an interlocutory injunction to restrain the Appellee from enforcing said unconstitutional and void State Laws aforesaid, and immediately the District Court entered an order setting a hearing of said motion before three judges, under the provisions of Secuon 266, as amended, of the Judicial Court. Proper notices were given and served on the Governor, the Attorney General and the Appellee, Ray L. Riley, as State Controller. Said Appellee filed a motion to dismiss the bill of complaint. The District Court, composed of three judges, denied the motion for an interlocutory injunction and granted the motion to dismiss without any opinion.

The Appellants, as tax payers and users of the highways, claim that they were entitled to an interlocutory injunction [fol. 39] prayed for restraining and enjoining said Ap pellee, as State Controller, as said State Laws are unconstitutional and void being contrary to and in violation of the provisions of the Federal Aid Legislation prohibiting "tools" of any kind, and also the Federal Constitution,

especially the Fourteenth Amendment thereof, and also contrary to and in violation of the Constitution of the State of California.

XVIII

The Appellants pray this Honorable Court to reverse the order of the lower Court refusing an interlocutory and granting the motion to dismiss the bill of complaint, and further direct the lower Court to issue a permanent injunction prayed for in the bill of complaint, and direct the lower Court to enter a decree commanding Ray L. Riley, as State Controller, to pay over to the registry of the Court all of the said moneys which have been received by him under the provisions of said illegal, void and unconstitutional State Laws since March 31, 1928, and for allowances, distributions and payments as may be hereafter determined, awarded and decreed to said Plaintiffs (Appellants) and all persons, firms, associations and corporations similarly interested or situated who are entitled to receive the same benefits as the Plaintiffs (Appellants); the Appellants pray for any other and proper relief as this Honorable Court may deem proper and fit in the premises.

W. R. Crawford, Edwin C. Ewing, Solicitors for Appellants.

Designation of Parts of Records to be Printed.

1. Bill of complaint.

2. Motion for interlocutory injunction with affidavit.

3. Order of August 4, 1928, fixing hearing on interlocutory injunction before three judges.

[fol. 40] 4. Notice to and acknowledgment by the Governor, Attorney General and State Controller.

5. The motion to dismiss bill of complaint.

6. Order denying the interlocutory injunction and granting the motion to dismiss bill of complaint.

7. Order allowing appeal.

8. Citation.

9. Assignment of errors.

10. Names of solicitors and addresses.

W. R. Crawford, Edwin C. Ewing, Solicitors for Appellees, 625 North Elm Drive, Beverly Hills, California.

Proof of Service of Notice of the Foregoing

STATE OF CALIFORNIA,
County of Los Angeles, ss:

The undersigned, being first duly sworn, on oath deposes and says that on November 10, 1928, at Beverly Hills, California he deposited in the United States Post Office, in a sealed envelope, prepaid, addressed to U. S. Webb, Attorney General and Frank L. Guerena, Deputy Attorney General, Solicitors for Ray L. Riley, as State Controller, Appellee, State Building, San Francisco, California, two copies of the Points relied upon by Appellants, and the Designation of the Parts of Record to be Printed, being contained in the foregoing.

W. R. Crawford.

Subscribed and sworn to before me this 10th day of November, 1928. George F. Elmendorf, Notary Public in and for the State of California, County of Los Angeles. Seal George F. Elmendorf, Notary Public, Los Angeles Co., Cal.

[fol. 41] [File endorsement omitted.]

Endorsed on cover: File No. 33,838. N. California D. C. U. S. Term No. 529. Geo. B. Williams, William J. Finn, M. L. Myers, et al., appellants, vs. Ray L. Riley, as State Controller of the State of California. Filed November 5th, 1928. File No. 33,838.

IN THE

Supreme Court of the United States

October Term, 1928

No. 529

GEO. B. WILLIAMS, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller,
Appellee.

STATEMENT AND PETITION TO ADVANCE

Comes now the Appellant in the above entitled cause and petitions that this cause be advanced for early hearing, and in support thereof, makes the following statement of the matter involved, and reasons relied upon for advancement.

(a) The appeal is based upon the provisions of paragraph 3 of Section 238 of the *Judicial Code,* as amended by the Act of February 13, 1925, *C.* 229, 43 *Stat.* 936.

(b) The lower Court, composed of three judges, entered an order on September 28, 1928, denying the motion for an interlocutory injunction, and granting the motion to dismiss the bill (Record, p. 23). The plaintiffs (now appellants) presented their application for this appeal on October 15, 1928 (Record, p. 24).

(c) The bill of complaint shows that: the plaintiffs instituted the action as a class suit (Record, p. 2); the defendant is the State Controller of California (Record, p. 3); Congress enacted the Federal Aid Legislation providing states must assent to the provisions of said Aid Legislation, and the state duly assented to and agreed to abide with all the provisions of said Federal Aid Legislation, including the prohibition against tolls of all kinds (Record, p. 3); the State has received many millions under such Federal Aid Legislation adopted by the State, and in the future will receive additional millions, and all highways in the State are post roads and covered by the said provisions of said Aid Legislation (Record, p. 4); the State duly enacted a Constitution (Record, pp. 4, 5); the State enacted a law in 1923, which was amended in 1925 and 1927 (Record, pp. 5, 6); said State Laws were enacted to raise revenue in the nature of compensation for the use of highways by motor propelled vehicles, and the plaintiffs must pay in advance the exactions under said State Laws while others are entitled to refunds, and such exactions are "tolls" (Record, p. 6); the distributors collect all such exactions from all consumers and keep one per cent thereof (Record, p. 6); the distributors receive the benefits of the moneys collected from 1½ to 4½ months (Record, pp. 6, 7); the defendant has and will in the future pay over to said distributors and others exempted, as refunds, many hundreds of thousands of dollars at a loss of one per cent, as the defendant pays out 100 per cent while he has only collected 99 per cent, and said refunds benefit the said distributors and exempted consumers (Record, p. 7), the moneys collected are divided between the State and Counties while the Munici-

palities receive no portion and said Municipalities must construct and maintain the highways within their limits (Record, p. 7); the plaintiffs are tax-payers using the highways by their motor propelled vehicles and must pay in advance said exactions which are not a part of the price of said fuel, and such exactions are "tolls," and the plaintiffs have and will be compelled to pay taxes and assessments for the construction or reconstruction, repair and maintenance of the highways within the limits of the municipalities, and 40 per cent of the moneys collected is received from the use of the highways outside of said municipalities while the other 60 per cent is an exaction for the use of the streets of municipalities, and said municipalities and the plaintiffs receive no benefits whatsoever from such exactions and payments (Record, pp. 7, 8); the defendant solely under color of his office has and will continue to demand and collect said illegal exactions under the provisions of said State Laws, and will collect many thousands of dollars daily, and will collect millions during the period from March 31, 1928, to July 1, 1928, and has paid out about $800,000 for refunds during the same period; the defendant will immediately expend and distribute said moneys as provided for in said State Laws; said illegal acts of said defendant acting under said unconstitutional State Laws have and will obstruct and impair the unrestricted use of said Federal aided highways, and the streets within the municipalities, to the irreparable loss, damage and injury to the plaintiffs and all others similarly interested or situated (Record, pp. 8, 9); the provisions of said unconstitutional Laws, and the acts of said defendant in enforcing the said unconstitutional Laws, were and are void and uncon-

stitutional, being contrary to and in violation of the Constitution of the United States, especially the 14th Amendment thereof, the Federal Aid Legislation and the contract made by the State, and the Constitution of the State, the protection of all of which the plaintiffs and all other persons, firms, associations and corporations similarly interested and situated pray; no plain, adequate and complete remedy at law; matters involved exceed $3000, exclusive of interest and costs; the plaintiffs, on behalf of themselves and all others similarly interested and situated, pray for an interlocutory injunction restraining the defendant from disbursing, using, apportioning or expending any moneys which have been or will be received by him as collections from March 31, 1928, and is directed to keep all moneys collected from March 31, 1928, in a separate fund intact, so as to await the final decree, and the court call in two judges, one of which is a circuit judge, for the hearing of an application for an interlocutory injunction under Section 266, as amended, of the *Judicial Code,* and upon a final hearing before said court, consisting of three Judges, for a decree declaring said State Laws are void and unconstitutional and the defendant be permanently restrained from enforcing said illegal, void and unconstitutional State Laws, and the defendant pay into the registry of the Court all the moneys collected since March 31, 1928, and for such allowances, distributions and payments as the Court may determine, award and decree, and for all other proper and further relief as may be just and equitable in the premises, and for costs and disbursements (Record, pp. 9, 10, 11).

The plaintiff moved for such interlocutory injunction (Record, pp. 12, 13, 14).

The lower Court entered an order and called in two other judges, one of whom is a Circuit Judge, and set the hearing on said motion (Record, pp. 15, 16). The plaintiffs served proper notices to the Governor, the Attorney General and the defendant (Record, p. 17).

The Court composed of three judges, heard such motion and also a motion to dismiss filed by defendant. Denied the motion and granted the motion to dismiss (Record, p. 23).

The lower Court refused and failed to file a written opinion, although the plaintiffs at the hearing requested the Court to file a written opinion.

(d) The following cases sustained the jurisdiction:

Buck v. Kuykendall, 276 U. S. 205;
Morris, et al., v. Duby, et al., 47 Sup. Rep. 548.

WHEREFORE the appellants pray this Honorable Court to sustain its jurisdiction, and to advance this case.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors of Appellant.

SUBJECT INDEX

PAGE

Statement 1

Specification of Errors..... 9

ARGUMENT:

I.

The Supreme Court of California has Interpreted the Provisions of Chapter 267, Laws of 1923, and Declared That the Sole Object or Purpose Thereof Was to Exact License Taxes for Motor Vehicles Operated Over the Public Highways, So as to Raise Funds With Which Such Highways May Be Improved and Kept in Repair. And That Such Taxation Is Imposed Exclusively Upon the Owners or Operators Using the Highways By Their Motor Vehicles..... 12

II.

The Interpretation of the Meaning of Said State Laws Is Binding Upon the Federal Court, But It Is the Duty of This Court to Determine Whether Such State Court's Interpretation Is in Violation of the Federal Constitution or Not 16

III.

The Said Motor Vehicle Fuel Exactions Are "Tolls," Being Charges Collected, in Advance, Solely for the Use of Highways by Motor Vehicles..... 17

IV.

The Said Motor Vehicle Fuel Laws Are Unconstitutional as Well as the Acts of Defendant in Enforcing the Same, Being Contrary to and in Violation of the Fourteenth Amendment of the Federal Constitution..... 25

V.

The Federal Aid Legislation, Prohibiting "Tolls of all Kinds," Was Adopted By the State. Such Act of the State Created a Contract Under Which the Public Was Protected and Said Motor Vehicle Fuel Laws Are Unconstitutional 32

PAGE

VI.

The Provisions of Said State Laws Are Unconstitutional and Void, Being Contrary to and in Violation of the Constitution of California 41

VII.

The Acts of Appellee Enforcing Said State Laws Were Performed Under Color of His Office, and Such Acts Are Void and Illegal, and the Appellants Were Entitled to a Temporary Injunction 44

VIII.

The Action of the Lower Court, in Granting the Motion to Dismiss the Bill of Complaint, Is Erroneous, and Refusing the Oral Request That the Court File a Written Opinion 44

Conclusion 45

CITATIONS AND AUTHORITIES

A

Achinson v. Huddleson, 12 How. 294, 13 L. Ed. 993 35

B

Bacon Service Corp. v. Huss, 199 Cal. 21, 248 Pac. 235 29

Balt. & Ohio R. R. v. Maryland, 21 Wall. 456, 475, 22 L. Ed. 444, 449 37

C

Chicago Gt. Western R. Co. v. Kendall, 266 U. S. 96, 69 L. Ed. 188 41

Chicago Motor Club v. Kinney, 160 N. E. 163 31

Citizen's Savings & Loan Ass'n. v. Topeka, 20 Wall. 655, 22 L. Ed. 455 31

City of St. Louis v. Tiefel, 42 Mo. 590 43

Conlin v. State, 109 Cal. 376, 42 Pac. 279 31

Cooley on Taxation, Sec. 174 31

CITATIONS AND AUTHORITIES—*Continued*

PAGE

D

Deering & Co. v. Peterson, 75 Minn. 118..... 31

E

Ex parte Young, 209 U. S. 123, 52 L. Ed. 714..... 41

F

Federal Highway Act, C. 119, 42 Stat..... 2

Ft. Smith v. Scruggs, 70 Ark. 549..... 17

G

Green v. Frazier, 253 U. S. 233, 64 L. Ed. 878..... 30

H

Hanover F. Ins. Co. v. Carr, 272 U. S. 179, 71 L. Ed. 224.... 16

Harmon v. Chicago, 147 U. S. 408, 409, 37 L. Ed. 216..... 28

Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385..... 19

Home T. & T. Co. v. Los Angeles, 227 U. S. 678, 57 L. Ed. 510 41

I

In re Ops., 81 N. H. 552, 120 Atl. 629..... 20

In re Ops., 250 Mass. 591, 146 N. E. 651..... 22

In the Matter of Schuler, 167 Cal. 282, 139 Pac. 549..... 17

K

Kane v. New Jersey, 248 U. S. 160, 61 L. Ed. 222..... 19

Kane v. State, 81 N. J. L. 594, 80 Atl. 453..... 18

L

Lake Superior, Etc. R. R. Co. v. U. S., 3 Otto 442, 23 L. Ed. 965 36

Laws 1923, Chap. 267..... 3

Looney v. Crane, 245 U. S. 176, 62 L. Ed. 230..... 41

Lowell v. City of Boston, 111 Mass. 454..... 31

CITATIONS AND AUTHORITIES—*Continued*

PAGE

M

Molineux v. State, 109 Cal. 376, 42 Pac. 34 31

N

Neil, Moore & Co. v. Ohio, 3 How. 721, 11 L. Ed. 800 34

New Hampshire Laws of 1923, Chap. 75 22

O

Old Homestead Bakery v. Marsh, 75 Cal. App. 247, 242 Pac. 749 12

Ouachita, etc., Packet Co. v. Aiken, 221 U. S. 444, 449, 30 L. Ed. 976, 978 38

P

People v. Parks, 58 Cal. 624, 639, 640 43

R

Riley v. Havens, 193 Cal. 438 41

Robbins v. Kadyk, 312 Ill. 290, 143 N. E. 863 31

S

Sands v. Manistee River Imp. Co., 193 U. S. 288, 31 L. Ed. 149 28

Searight v. Stokes, et al., 3 How. 151, 168, 11 L. Ed. 537, 545 33

Sharpless v. Mayor, Etc., 21 Penn. 168 42

Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352, 405, 57 L. Ed. 1511, 1544 20

U

U. S. v. California, etc., 148 U. S. 31, 37 L. Ed. 354 36

U. S. v. Dalles M. Road Co., 140 U. S. 599, 35 L. Ed. 561 36

U. S. v. Michigan, 190 U. S. 379, 399, 400, 47 L. Ed. 1103, 1110, 1111 38

W

Water Co. v. Wade, 59 N. J. L. 78 31

Western U. T. Co. v. Andrews, 216 U. S. 165, 54 L. Ed. 430 .. 41

INDEX TO APPENDIX

	PAGE	FOLIO
Provisions of California Constitution	11	33
Section of State Motor Vehicle Act, as Amended	10	29
Sections of State Law Regulating Motor Vehicle Fuels	1	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
Appellants,

vs.

RAY S. RILEY, as State Controller of the State of California,
Appellee.

BRIEF OF APPELLANTS

Statement.

The bill of complaint shows:

The plaintiffs instituted the action as a class suit. (R. 2.)

I.

The defendant is the State Controller. (R. 2.)

II.

Congress on July 11, 1916, duly enacted the Post Road Act to aid the States in the construction of rural post roads. Chap. 241, 39 Stat. at line 355. (R. 2.)

The State enacted a law in 1917, in order to receive aid by which the State assented and agreed to abide by all the provisions of said Federal Act. Chap. 29, Laws of 1917. (R. 2.)

Congress on November 9, 1921, amended and supplemented the Post Road by the *"Federal Highway Act."* Chap. 119, 42 Stat. at line 212. (R. 3.) Said Federal Acts provide:

> "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds." (R. 3.)

Again:

> "The term 'Construction' means the supervising, inspecting, actual building, and all expense incidental to the construction of highway, except locating, surveying, mapping, and costs of rights of way." (R. 3.)

Again:

> "The term 'Reconstruction' means a widening or a rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs." (R. 3.)

The Federal moneys could be used only for construction or reconstruction, but the State must, at its own cost, maintain and repair the highways and failing so to do, the Secretary of Agriculture shall proceed to maintain and repair said highways and charge the cost against the Federal fund allotted to said State. (R. 3)

The Federal Government has paid over to the State many millions of dollars and will in the future pay many additional millions of dollars to said State under the provisions of said Federal Acts so adopted by the State. (R. 3, 4.)

That all the highways of the State are post roads, and

the public highways of the State are covered by the said provisions of said Federal Acts. (R. 4.)

III.

The State Constitution provides that neither the legislature nor any officer can appropriate or draw any money from the State Treasury for the purpose or benefit of any corporation, etc.; every act shall embrace but one subject, which shall be expressed in its title; the legislature has no power to pass local or special laws: for the assessment or collection of taxes, refunding moneys paid into the State Treasury, granting to any corporation, association, or individual any special right, privilege or immunity, or exempt property from taxation; the legislature has no power to give or to lend, or to authorize the giving or lending, of credit of the State in aid of or to any person, association, or corporation, nor shall it have power to make any gift of any public money or thing of value to any individual, etc., whatsoever. (R. 4, 5.)

IV.

The State in 1923 enacted a law entitled:

> "An Act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said Act, and repealing all acts and parts of acts inconsistent herewith." Chap. 267, *Laws 1923.* (R. 5.)

The State amended said law in some respect by Chap. 359, *Laws 1925,* and Chap. 716, *Laws 1927.* (R. 5.)

In the year 1927, the state amended said law by add-

ing one cent to the two cents per gallon. Chap. 795, *Laws of 1927.* (R. 5, 6.)

The State Court has declared the meaning and purpose of said Motor Vehicle Fuel Law of said Chap. 267, *Laws 1923,* as amended aforesaid. (R. 6.) The said *Law of 1923* was construed with the Motor Vehicle Law so as to raise revenue in the nature of compensation for the damage done to the highways by motor propelled vehicles; that by reason of the provisions granting refunds, the plaintiffs and all others similarly interested or situated must pay in advance said exactions, solely in order to use their motor propelled vehicles on the public highways, and said exactions are "tolls" for such use; the distributors do not pay a cent, but collect from all the consumers of motor vehicle fuels; the distributors keep one per cent of all moneys so collected and do not pay over to said defendant the entire amount so collected and said one per cent is a gift; said distributors enjoy the benefit of the use of the moneys collected during the said periods plus an additional 45 days, and said distributors have received such benefits from said collections from all consumers; the defendant has and will in the future pay over to said distributors and consumers exempted by said law, as amended, as refunds, many hundred of thousands of dollars at a loss of one per cent as aforesaid, as he has only received 99% of the monies so collected, not only from the plaintiffs and other similarly interested or situated, but also from the exempted consumers, and such procedure benefits the distributors and exempted consumers; the moneys received from the defendant are divided between the State and the counties, and no portion thereof is paid over to the municipalities, but they

must maintain, repair, construct or reconstruct the streets by moneys from taxes and assessments and all of said moneys so received by defendant are used for the sole purpose of constructing or reconstructing, maintaining and repairing the highways outside of the limits of said municipalities. (R. 6, 7.)

V.

The plaintiffs, as well as others similarly interested or situated, are taxpayers and have and are now operating motor vehicles on the highways and must pay in advance for said motor vehicle fuel before so operating on said Federal aided highways or on the streets of municipalities, and said exactions are not a part of the price of said fuel, but in addition to the purchase price. (R. 7.)

Such exactions are "tolls" and the cost per mile of said use depends upon the size and weight of said vehicles; the plaintiffs, as fell as said others, have been compelled to pay and will be compelled to pay taxes and assessments for the construction, reconstruction, maintenance and repair of the streets of the municipalities, and that about 40% of all moneys so received by the defendant is a charge for the use of public highways outside of said municipalities, and the other 60% is a charge for the use of streets within said municipalities, although neither the municipalities nor the plaintiffs, as well as said others, as taxpayers receive any benefits whatsoever from such exactions and payments. (R. 7, 8.)

VI.

The defendant, solely under color of his office, has in the past and will in the future continue to demand and collect said illegal exactions under the provisions of said

State laws; such collections amount to many thousands of dollars daily; the defendant has received the tax roll and has demanded about $8,477,293.00 during the period from March 31, 1928, to July 1, 1928, and the defendant has paid out during the same period about $800,000.00, as refunds under said State laws. (R. 8.)

Defendant will immediately distribute the money, as provided by said State laws, and no portion thereof will be distributed or apportioned to said municipalities. (R. 8.)

That said illegal acts of the defendant, acting under said unconstitutional laws, have and will continue to obstruct, hinder, impair and impede the unrestricted and vested passage, use and operation of said motor vehicles on said Federal aided highways, and the streets within the limits of said municipalities, to the irreparable loss, damage and injury to said plaintiffs and all said others, unless the defendant is restrained by the Court. (R. 8, 9.)

VII.

The provisions of said unconstitutional State laws, to-wit, Chapter 267, *Laws 1923,* Chapter 359, *Laws 1925,* Chapters 716, 795, *Laws of 1927,* and the said illegal acts of said defendant in enforcing said State laws, were and are void and unconstitutional, being contrary to and in violation of the Federal Constitution, especially the Fourteenth Amendment thereof, the *"Federal Highway Act,"* being Chapter 241, 39 Stat. at line 355, and Chapter 119, 42 Stat. at line 212, as adopted by the State, being Chapter 29, *Laws of 1917,* and further contrary to and in violation of the State Constitution, the protection

of all of which the plaintiffs, as well as said others, pray. (R. 9.)

VIII.

No plain, adequate and complete remedy at law. (R. 9.)

IX.

The value involved exceeds $3,000, exclusive of interest and costs. (R. 9.)

X.

The plaintiffs, on behalf of themselves as well as others similarly interested or situated, prayed for a temporary injunction enjoining defendant, as State Controller, from in any way or manner disbursing, using, apportioning or expending any of the moneys which have been or will be received by him as collections from March 31, 1928, and he is directed and commanded to safeguard and keep intact all moneys from said collections after March 31, 1928, so as to satisfy any final decree, and they prayed for a hearing and determination of said motion for a temporary injunction before three judges, one of whom to be a Circuit Judge, and said Statutory Court shall upon the final hearing enter a decree declaring the said State laws, being Chapter 267, *Laws of 1923,* Chapter 359, *Laws of 1925,* and Chapters 716 and 795, *Laws of 1927,* are void and unconstitional, and that the defendant, as State Controller, be forever enjoined and permanently restrained from enforcing the said illegal, void and unconstitutional State laws, and further said defendant to immediately pay over to the registry of the Court all of the moneys which he has received under the provisions of said illegal, void

and unstitutional State laws since March 31, 1928, and for such allowances, distributions and payments as may be hereafter awarded by the Court, and for all other proper and further relief as may be just and equitable in the premises, and for the costs and disbursement. (R. 10, 11.)

The plaintiff, Geo. B. Williams, verified the bill of complaint. (R. 11)

Motion for Interlocutory Injunction

Motion for Interlocutory Injunction until the final determination of the cause; requested a Statutory Court to hear said motion, and pass on it, and also to finally hear and determine said action.

The motion was based upon the records and files and the affidavit attached to motion. (R. 11.)

Affidavit

Finn, one of the plaintiffs, is the owner and operator of motor vehicles, using the highways and the streets within the limits of municipalities; he is the owner of real estate in the City of Los Angeles, and has paid real and personal taxes in said city; he charges on information that the streets in said city are maintained and repaired by said taxes, and the exactions under said State laws do not furnish any funds to maintain or repair the streets of any municipalities, as the proceeds thereof are divided by the State and the counties; that the defendant had paid out money for refunds after the period in which he has received said collections; the defendant will disburse and turn over to the fund created by the law, and he will lose control and possession of

said moneys which he will collect since the 31st of March, 1928, unless enjoined by the Court; the affiant, as well as said others, will not be able to recover back said moneys, if the defendant loses the control and possession of said moneys, and they will be irreparably damaged and their moneys lost. (R. 12.)

Motion to Dismiss Bill of Complaint

The defendant was represented by his solicitors, U. S. Webb, Attorney-General, and Frank Q. Guerena, Deputy Attorney-General. The said motion contains six paragraphs. (R. 14, 15.)

Order Denying Interlocutory Injunction and Dismissing Bill of Complaint.

Short order denying the motion for an Interlocutory Injunction and granted the motion to dismiss the Bill of Complaint. (R. 16.)

No opinion served or filed.

Petition for Appeal with Assignment of Errors.

Allowance of Appeal. (R. 17, 18.)

Specification of Errors

I.

The lower Court erred in denying the motion for a temporary injunction.

II.

The lower Court erred in granting the motion to dismiss the bill of complaint.

III.

The lower Court erred in failing and refusing the plaintiffs and all persons, firms, associations and corpo-

rations similarly interested or situated the protection of the Federal aid legislation, especially the prohibition against "tolls of all kinds," and the contract so adopted by the State.

IV.

The lower Court erred in permitting the defendant to enforce the provisions of said unconstitutional State laws, requiring the plaintiffs and all others similarly interested or situated to pay the said exactions contrary to and in violation of the Federal aid legislation, prohibiting "tolls" of all kinds and the contract so adopted by the State, the protection of which the plaintiffs and said others prayed.

V.

The lower Court erred in refusing to decide that said State laws compelling the plaintiffs and all said others to pay three cents on every gallon of said motor fuel and the acts of the defendant thereunder enforcing said exactions were "tolls" and were illegal, void and unconstitutional, being contrary to and in violation of the Federal aid legislation, and the contract intered into by the State in which it agreed not to levy any kind of toll for the use of said highways.

VI.

The lower Court erred in refusing to decide that said motor vehicle fuel laws of the State and the acts of the defendant in enforcing the said unconstitutional laws were illegal, void and unconstitutional, being contrary to and in violation of the provisions of the Fourteenth Amendment of the Federal Constitution, prohibiting the making or enforcement of any law which shall abridge the privilege or immunities of a citizen, or which shall

deprive any person of life, liberty or property without due process of law or deny to any person the equal protection of the laws, and the plaintiffs and all persons, firms, associations and corporations, prayed protection under said provisions of said Fourteenth Amendment.

VII.

The lower Court erred in refusing to decide that said motor vehicle fuel laws of the State and the acts of defendant in enforcing the said unconstitutional laws were illegal, void and unconstitutional, being contrary to and in violation of the provisions of the Constitution of the State of California, relating to titles of acts, prohibiting gifts, privileges and immunities, refunds, person's life, liberty or property without due process of law or denying the equal protection of the laws, and said plaintiffs and said others prayed protection under said provisions of said State Constitution.

VIII.

The lower Court erred in refusing and failing to file a written opinion in denying said motion for a temporary injunction and granting the motion to dismiss the bill of complaint, although at the hearing the plaintiffs requested the Court so to do.

ARGUMENT

I.

The Supreme Court of California has interpreted the provisions of Chapter 267, Laws of 1923, and declared that the sole object or purpose thereof was to exact license taxes for motor vehicles operated over the public highways, so as to raise funds with which such highways may be improved and kept in repair. And that such exaction is imposed exclusively upon the owners or operators using the highways by their motor vehicles.

In delivering the opinion of the Court, Judge Hart said:

> "Of course, the purpose of the legislation exacting license taxes for motor vehicles operated over the public highways is to raise funds with which such highways may be improved and kept in repair in such manner as suitable to the mode of transportation peculiar to motor vehicles. The theory of such a tax, particularly under present-day conditions as the character of the highways required and the great expense in constructing and maintaining them, is, manifestly, that it is only just and proper that those who use the public highways either for business purposes or for pleasure should bear the expense of keeping in repair those already improved * * *
>
> and to contribute to the construction of new reads. * * *, the burden thus imposed upon motor vehicles or the owners and operators thereof, considering, of course, the particular use to which such vehicles are put, their weight, and such other elements as might properly enter into determination of the probable effect, as to the matter of 'wear and tear,' the use of each of the various classes the various vehicles would have upon the roads. * *.
>
> "The expense of maintaining the public highways from the greatly increased use and consequently wear and tear to which thus the highways now are

and have been subjected, has of necessity proportionately been increased, and, must naturally, if, * * * the greatly enhanced cost of improving and keeping in proper repair the highways * * *, in bearing the burden necessarily coincident with the work of improving and maintaining the public highways * * *.

"It is true that the license tax of 2 cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles; yet that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of 2 cents on every gallon of gas that they purchased for use in propelling motor vehicles is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes against the goods and wares of the vendor thereof and by him paid are always included in so-called 'overhead expenses,' and, of course, constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer; * * * * * * * * "the legislature of 1923 passed an act establishing an entirely new system for the raising of revenues for said purpose, so far as gas and other fuel cars are concerned, by requiring, practically, the owners or operators of all such cars to pay to the State, in addition to nominal registration fees, two cents per gallon for all gas consumed in the operation thereof. (Stats. 1923, p. 571.)

"The first section of the act defines the meaning of a number of the terms used in the statutes, * * the second section provides that every distributor, etc., of fuel gas, so engaged when the act goes into effect, and any person, etc., intending thereafter to become such distributor, etc., shall within a specified time register as such distributor with the State Board of Equalization, whereupon said Board shall issue to such distributor a license, etc. Section 3 fixes a tax of two cents per gallon of fuel gas sold

to every owner or operator of fuel gas motor vehicles and provides that the payment thereof shall be to the State Controller, in quarterly installments. Section 6 provides that, within a certain period of time, specified therein, every distributor of gas fuel, shall file with the State Board of Equalization, within twenty days after the end of each quarter, a verified statement in a certain prescribed form, showing, among other things, the total number of gallons of motor vehicle fuel, etc., sold and distributed within the state by such distributor. Failure by any distributor to file such statement entails, by virtue of the provisions of Section 8, a certain penalty. * * *

"The eleventh section provides that any person, firm, corporation, etc., who shall buy motor vehicle fuel for purposes other than in motor vehicles operated or intended to be operated upon public highways, and also those buying such gas to be used and used exclusively in motor vehicles employed in the transportation of rural free delivery mails, shall be reimbursed by the State in the amount of the tax on fuel gas as provided by said Act, upon presenting to the State controller, in the form prescribed, a claim for the total amount so paid, all applications for such reimbursements to be filed with the controller within six months from the date of the purchase of such motor vehicles fuel. * * *.

"Section 12 vests the State Board of Equalization with the right to make such examinations of the records of distributors as it may deem necessary for the carrying out of the provisions of the Act.

"Section 13 provides that all license taxes collected by the State controller in pursuance of the provisions of said Act shall be by that officer deposited in the State treasury and credited to the 'motor vehicle fund,' which the Act expressly creates, and further provides that one-half of the net amount of all the moneys so received shall be paid to the counties of the State in certain designated proportions and the same placed in 'a special road improvement fund,' and to be expended by the coun-

ties receiving them 'exclusively in the construction and maintenance of roads, bridges, and culverts in each such county.' The moneys remaining after the payment of the amount above indicated to the counties are appropriated by the Act (Section 12), to the 'State highway maintenance fund,' to be used exclusively in the maintenance, repair, re-construction, etc., of state highways, and roads and highways in state parks. * * *.

"At the same session of the legislature at which the Act above considered was passed, the Act containing the provision (Section 77) * * * was passed. * * * [2] The attorney-general, representing the respondents, insists that * * * the two Statutes of 1923—the one dealing with automotive highway traffic and other matters pertaining to the use of motor vehicles, and the other levying a fuel gas tax of two cents per gallon, to be paid by all persons operating by gas—must be read, and considered together as being *in pari materia*. This position is vigorously assailed by counsel for the petitioners * * * and the two acts in that particular *are in pari materia;* that they constitute one law."

Old Homestead Bakery v. Marsh, 75 Cal. App., 247, 242 Pac. 749;

This case was affirmed by the Supreme Court on January 24, 1926.

The respondent's attorney was Attorney-General U. S. Webb.

It is seen that all consumers must and do, pay in advance two cents per gallon of said motor fuel to the distributors as tax collectors, and those consumers or distributors who do not use the public highways or are exempt, collect back from the State Controller, said two cents, although said State Controller only received from said tax collectors, distributors, 99 per cent of said two cents, and thus the remaining consumers, to-wit: the

plaintiffs and all persons, firms, associations and corporations, similarly interested or situated, not only are charged for the use of the highways, but also to pay the said one per cent lost between the distributors, tax collectors and the State Controller. Said Act, chapter 267, Laws of 1923, has been amended in 1925, and 1927, but such amendments do not change or effect the said opinion aforesaid.

II.

The Interpretation of the Meaning of said State Laws is binding upon the Federal Court, but it is the duty of this Court to determine whether such State Court's interpretation is in violation of the Federal Constitution, or not.

The Supreme Court has lately re-affirmed this doctrine, in delivering the opinion. Mr. Chief Justice Taft said:

> "It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this court in St. Louis Southwestern R. Co. v. Arkansas, 235 U. S., 350, at page 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:
>
> "Upon the mere question of construction we are, of course, concluded by the decision of the State Court of Last Resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which

the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." Hanover F. Ins. Co. v. Carr., 272 U. S., 179, 71 L. Ed. 224.

III.

The said motor vehicle fuel exactions are "tolls," being charges collected, in advance, solely for the use of highways by motor vehicles.

It is admitted that the appellants, as many thousands of persons, firms, associations and corporations, have and now are compelled to pay in advance said motor vehicle fuel exactions, before they can use the public highways, including the streets of municipalities by their motor vehicles and said exactions are in addition to the purchase price—(R. 6, 7, 8); that the moneys so collected must be divided between the State and the counties and used exclusively to maintain, repair or construct or reconstruct, highways outside of the limits of municipalities. (R. 7.)

The said California Courts announced that said exactions, charging the use of public highways solely by motor vehicles, were to create a fund to improve and maintain the public highways and all the moneys, so collected, only improve and maintain the public highways outside of the limits of municipalities.

These exactions are revenue measures and do not come within the police power of the State.

In the matter of Schuler, 167 Cal. 282, 139 Pac. 685. the said Court based its decision on the case of *Ft. Smith v. Scruggs*, 70 Ark. 549, 69 S. W. 679, also the case of

Kane v. State, 81 N. J. S. 594, 80 Atl. 453, and other decisions.

Arkansas Supreme Court in the opinion, Judge Riddick said:

> "The license fee imposed is, then not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed." Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679.

Again in opinion in the *Kane v. State,* is found:

> "A state may do these things because, having expended moneys, either itself or by the agencies created by it, in increasing the facilities which commerce, either interstate or intrastate, may be carried on, it is entitled to charge a fair remuneration for the outlay may by it, and for the maintenance of the public works it has constructed.
>
> "A very ordinary example of the exercises of this power is the construction of public roads known as 'turnpikes' by agencies created by the state, for the use of which tolls are permitted to be charged to persons using the same. Such public roads are open to the use of every person desiring to travel upon them upon payment of the tolls authorized to be charged.
>
> "Although, ordinarily, turnpikes are built and owned by corporations created by the State, for the purpose of constructing and maintaining them, what the state may do indirectly through such agencies it may do directly; that is, it may itself lay out and construct such improved public roads, and charge reasonable tolls to all persons using the same, without regard to the character of the business for which they are being used. And this is practically what New Jersey is now doing."
>
> *Kane v. State,* 81, N. J. L. 594, 80 Atl. 453.

The Supreme Court of the United States affirmed the judgment of the New Jersey Court that registration fees were exacted as "tolls."

Kane v. New Jersey, 248 U. S. 160, 61 L. Ed. 222.

In the decision of the New Jersey Court certain cases were cited upon which the decision rested.

One case cited was *Sands v. Manistee River Improvement Co.,* 193 U. S. 288, 31 L. Ed. 149, in which case the following appears in the opinion:

> "There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. * *
>
> "And to meet the cost of such improvement, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S., 543, 548 (30: 467)."

Again Mr. Justice McReynolds in delivering the opinion said:

> "In view of the many decisions of this Court there can be no doubt that where a State at its own expense, furnishes special facilities for the use of

those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385.

Again Mr. Justice Hughes said in delivering the opinion:

"While the State may not impose a duty of tonnage (citing cases), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority."

Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352, 405, 57 L. Ed. 1511, 1544.

Both Hendrick and Kane were non-residents of Maryland and New Jersey, and desired to pass through the said States, using the public highways by their motor vehicles. They refused to comply with the Motor Vehicles Acts, and relied upon the Commerce Clause prohibiting the States from exacting a duty, impost or tonnage charge. This Court re-affirmed the doctrine that such charges were not duties, imposts or tonnage charges, but tolls, and the States had the right to charge reasonable tolls for the use of highways by motor vehicles.

The Justices of New Hampshire tendered an opinion that the proposed motor vehicle fuel law was legal, if the charge was a "toll."

An excerpt from such opinion follows:

"A tax levied upon the privilege of selling gasoline is clearly outside the power to levy 'proportional and reasonable assessments, rates and taxes.' * * * But your inquiry seems to suggest that what is intended is not the levying of a tax, but rather the purpose in view is to fix a charge, or toll, for the use of the public highways of the state. It is within the legislative power to provide

that all highways, or any specific highways, shall be toll roads, and open to travel only upon the payment of a specified charge. (Citing the case of Kane v. State that the charge for the use of public roads by automobiles is a toll.)

"Many instances might be cited where governmental undertakings are supported in whole or in part by charges made upon those who avail themselves of the advantages afforded thereby. Waterworks, sewers, wharves, locks and canals are often maintained in this manner. Charges made in this way are not taxes. (Citing Sands v. Manistee, showing that a charge for artificial improvements is a toll.)

"Tolls that are reasonable in amount, and not discriminatory, have uniformly been upheld. Constitutional limitations upon the taxing power have no application to such levy. (Citing a large number of cases.)

"It is a matter of common knowledge that since the advent of the use of automotive vehicles upon highways large sums have been expended in making the conditions more favorable for that class of travel. No reason appears why the Legislature may not impose upon those who accept the benefits of such highway improvement and maintenance a reasonable charge for the use made. It is upon this ground that the state registration systems for automobiles have been sustained. The purpose of these laws is 'to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.' Hendrick v. Maryland, supra, 235 U. S. 622, 35 Sup. Ct. 142, 49 L. Ed. 385. * * *

"The charge can not be imposed upon sales of gasoline, generally, but only when the commodity is sold for consumption in the operation of vehicles upon the highways. A charge so limited amounts to the same thing, in substance, as a toll for the

use of the highways, and may lawfully be imposed by the Legislature."

In Re Ops (N. H.), 81 N. H., 552, 120 Atl. 629.

The State of New Hampshire enacted the law in 1923 with the following title:

"An Act to provide for a road toll and to amend the *Laws of 1921,* Chapter 119, Section 25, relative to license fees on motor vehicles."

Chapter 75, *N. H. Laws of 1923.*

This law was amended by Chapter 104, *Laws of 1926.* The law, as amended, provides in Sec. 4:

"Distributors pay to the State Treasurer a road toll of two cents per gallon, upon each gallon so reported, this being collected by the distributor from the dealer, and by the dealer from the consumers."

Sec. 7, Refunds if fuel is not used for the propulsion of motor vehicles upon highways—Moneys collected and used exclusively to maintain, repair and construct the public highways.

The Justices of Massachusetts rendered an opinion on a proposed license law. An excerpt of the opinion follows:

"In the early days of the commonwealth many, if not most of the highways were built and maintained by private enterprise through turnpike corporations established by law and dependent for their support upon tolls charged to travelers. Bridges were built and maintained in the same way. Ferries were operated either in the same way or by municipalities, which collected tolls for their use. All highways and bridges, so far as we are aware, and some of the ferries, have been acquired by the commonwealth, or by counties, cities or towns. * * * The free use of all highways has been provided at

the expense of the public treasury for many years in this commonwealth. This has not always been the custom. It is comparatively modern.

"(2) The power of government to take, acquire or construct instrumentalities for public travel to charge toll, rental or other recompense therefor is illustrated in several decisions. Commonwealth v. Wilkenson, 6 Pick. 175, 29 Am. Dec. 654; George G. Fox Co. v. Boston & Northern Street Railway, 217 Mass. 140, 142, 140 N. E. 356; Boston v. Treasurer and Receiver General, 237 Mass. 403, 414, 130 N. E. 390, and cases there reviewed.

"If and so far as such tolls or rentals are based upon fair recompense for initial construction and for adequate maintenance, they do not involve the power for taxation. The power proposed to be exercised in the present bill is not of that nature. Avowedly an excise tax is established. * * *

"Toll—at that time a word in common use in connection with turnpikes and bridges—thus was mentioned more than 100 years ago in the first decision requiring a critical consideration of the meaning of the word "commodities" in the Constitution as an illustration of an excise. * * *

" 'Toll' is the apt word to describe the collection of money for the use of a highway or bridge.

"(3, 4) There are appearances of inequality about a toll upon the use of highways by motor vehicles. The fact that no toll is charged for the use of highways by other kinds of vehicles bears a superficial likeness to discrimination against motor vehicles. It is a matter of common knowledge that the number of motor vehicles vastly exceed all others and that a different highway construction as to durability and smoothness is required for their convenience. * * *

"There is no general provision in the proposed bill for charging toll for motor vehicles owned by non-residents when used upon the highways of the commonwealth. That, too, may be found to be small in comparison with domestic use. * * *

"(5) A modern instance of the collection of toll

by way of excise tax is found in G. L. C. 63, Par. S. 62-66, for the operation of street railways in public ways. Collector of taxes against Bay State Street Railway, 235 Mass. 336, 125 N. E. 614. The collection of a tax levy by way of tollage or license for the use of public ways by motor vehicles has been upheld in other jurisdictions. (In support of such announcement, a large number of cases were cited, including Kane v. New Jersey, supra; Pierce Oil Corp. v. Hopkins, supra; Standard Oil Co. v. Brodie, supra; Hendrick v. Maryland, supra; in re Ops. of the Justices of New Hampshire, supra.)

* * *

"As a matter of abstract principle we are of opinion that it is within the constitutional power of the General Court to levy an excise as a toll for the use of public ways by motor vehicles. * * *

"The proposed bill is a revenue measure. It is not enacted in the exercise of the police power.

* * *

"(6) * * * An examination of the proposed bill plainly shows that it provides for an excise for the use of highways and not a property tax."

In re Ops. (Mass.), 250 Mass. 591, 146 N. E. 651. (Decided January, 1925).

We submit that such exactions are "tolls" and compel both non-residents and residents to pay in advance said charges. The Supreme Court has decided that a non-resident must pay said charges, being "tolls," on the ground that said charges are not prohibited by the Commerce Clause, and the defendant cannot argue that said charges are not "tolls," because users, being residents of the State, are not protected by the Commerce Clause, therefore, such charges are not "tolls."

IV.

The said Motor Vehicle Fuel Laws are unconstitutional as well as the acts of defendant enforcing the same, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution.

The appellants and many thousands of persons, firms, associations and corporations, have been and are now compelled to pay in advance 3 cents per gallon of such motor vehicle fuel before they can operate their motor vehicles on any highway, including any street of municipalities, and further every other person, firm, association and corporation must pay in advance said 3 cents, although they do not use any highway or street of municipalities by motor vehicles. The distributors collect said 3 cents per gallon from all the said consumers at the time of purchase. For instance, all of the consumers paid their 3 cents on April 1st, 1928, and said distributors keep and have the benefit of such moneys until they must account to the State Controller, to-wit, on the 14th of August, 1928. It is alleged and admitted that the distributors on August 14th, 1928, paid over to said State Controller about $8,477,293.00, being the amount paid from daily collections during the period from March 31, 1928, to Just 1st, 1928, except the one per cent of such collections kept by the distributors. The distributors collected on July 1st, 1928, and accounts to the State Controller for the next period from July 1st to October 1st, so that said distributors always have the use and benefit of at least $4,000,000.00, without considering the said benefit of one per cent of all collections.

The only distributors are the ones who produce, refine

or distribute said fuel, and there are about 21 distributors in the State who receive this privilege of the use and benefit of said $4,000,000.00 and said one per cent.

(a) *The one per cent is illegal.* The distributors keep one per cent of all monies collected from all consumers. Under the provisions of said State laws, the distributors are entitled to said one per cent only at the time of collection to "cover subsequent losses occasioned by evaporation and handling." (See Appendix, p. 2, f. 6.) In other words, the distributor is granted a privilege to receive money in advance of any loss by evaporation and handling, which may be occasioned in the future, whether or not there has been no loss or handling, and said one per cent comes out of the pockets of all the appellants and said others similarly interested or situated.

(c) *Refunds.* Sec. 11 of said State laws (see Appendix, p. 5, f. 15) provides that any persons, etc., buying such fuel and using the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax, shall be reimbursed and repaid the amount of such tax by the State Controller, and application for such refund shall be filed with the State Controller within twelve months from the date of purchase of said fuel.

The State Controller, the appellee, paid out about $800,000.00, as returns to consumers, being the actual amount of moneys paid to said distributors.

The State Controller never received one per cent of such amount, as said distributors kept it for losses in the future that might be occasioned by evaporation and handling.

The State Controller takes from the moneys he received from the appellants and all persons, firms, associations and corporations similarly interested or situated, the said one per cent.

By such State laws the said appellants and said others are being taxed for the benefit of those who have and will receive such refunds, either distributors or consumers, or both.

(d) *The said exactions cannot be enforced against any person who has not been benefited.*

The appellants and all said others similarly interested or situated have and will be compelled to pay in advance the entire amount collected by said distributors, as tax collectors, though 60% of said amount was collected illegally, as they do not wear out or damage the public highways outside of the limits of municipalities, but wear out and damage the streets thereof and for such use of said streets, the appellants and all said others have and will pay taxes and assessments, in order to maintain, repair, construct or reconstruct said streets, and recover not a cent from such amount collected as aforesaid, has been and will be used to maintain, repair, construct or reconstruct said streets.

The sole purpose, as announced by the California Courts, was to collect a "toll" to reimburse the State for construction and reconstruction, and for maintenance and repairing only those highways outside of the limits of municipalities, so it follows that the State cannot legally enforce said "toll."

This Court had before it a suit involving the distinction between a toll and a tonnage impost. The city of Chicago passed an ordinance requiring boats operating

in the Chicago River to obtain licenses. The only defense presented by the City was that such fees were charged and collected as compensation for benefits conferred in providing an improved public highway, and that said license fees were tolls. This Court cited the cases of *Huse* v. *Glover*, 119 U. S., 54, 30 L. Ed. 487, and *Sands* v. *Manistee River Imp. Co.*, 123 U. S., 288, 31 L. Ed., 149.

In delivering the opinion Mr. Justice Field said:

> "The attempt is made to assimilate the present case to those cases from the fact that it is contended that the Chicago River is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen, nor can arise to the tugs in question by the alleged deepening of the river."
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> *Harmon* v. *Chicago*, 147 U. S. 396, 409, 37 L. Ed. 216.

In speaking of a License Act, relating to the 4 per cent gross tax of 1923, Justice Shenk in delivering the opinion of the California Supreme Court said:

> "An examination of the entire statute discloses that the obvious and only purpose of the act was to provide a revenue with which to maintain and repair the public highways of the state outside of incorporated cities, and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire over such public highways. The act is not a police measure in any sense. It provides for license tax for revenue purposes only."

Interpreting Section 8, the opinion said:

> "The license taxes here imposed by the Legislature are in furtherance of a state purpose for the maintenance of state highways and to extend aid in the maintenance of county highways."

Interpreting Section 9, relating to exemptions of certain classes of vehicles, the following is found in the opinion:

> "It is apparent that this exemption and the further exemption * * * were intended to apply to those who are engaged in the business of operating motor vehicles for hire within the limits of incorporated cities. As such, they may be properly so separately classified for the reason that highways within the municipality are usually not maintainable directly at the expense of the state but from municipal revenues derived from the exercise of municipal powers of license and taxation, and it must be assumed that the Legislature had this distinction in mind in limiting the license to the use of highways maintainable by the state and for whose maintenance the municipalities are not responsible."
>
> *Baron Service Corp. v. Hunt*, 199 Cal. 21, 248 Pac. 235.

Under the provisions of this Act certain operators deducted from their gross receipts all of the amount of licenses paid by them to cities.

It is admitted that 60 per cent of the whole amount was received by the appellee, State Controller, from the appellants and all others similarly interested or situated, for the use of the streets of municipalities and that no portion of said amount was used in the maintenance, repair, construction or reconstruction of streets in the municipalities, but all such amount was used on highways or roads outside of the limits of the municipalities,

and it follows that the said appellants and said others have been charged said "tolls," although they have paid to said municipalities for the use of said streets, and they have not received any benefits from said "tolls."

(e) *The appellants and all said others are tax payers and are entitled to protection.*

The admitted facts show that the appellants and all said others are taxpayers and under the provisions of said Motor Vehicle Fuel Laws they are forced to pay money for private purposes and to private persons. These motor vehicle fuel laws are not enacted for public purposes.

Mr. Justice Day in delivering the opinion said:

> "The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not give the right to impose taxes for private purposes. Fallbrook Irrigation District v. Bradley, 164 U. S. 155, 17 Sup. Ct. 56, 41 L. Ed., 369. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed by the late Mr. Justice Peckham speaking for the Court. Concluding the discussion of that subject (164 U. S. 158, 17 Sup. Ct. 63, 41 L. Ed. 369), the Justice said:
>
> "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any than a public use becomes material in this court,

even where the taking is under the authority of the state instead of the federal government."

Green v. Frazier, 253 U. S. 233, 64 L. Ed. 878.

To the same effect:

Deering & Co. v. Peterson, 75 Minn. 118;
Conlin v. State, 114 Cal. 404, 46 Pac. 279;
Molineux v. State, 109 Cal. 376, 42 Pac. 34;
Water Co. v. Wade, 59 N. J. L. 78;
Robbins v. Kadyk, 312 Ill. 290, 143 N. E., 863;
1 Cooley on Taxation, Sec. 174;
Citizens Savings & Loan Ass'n v. Topeka, 20 Wall 655, 22 L. Ed., 455;
Lowell v. City of Boston, 111 Mass. 454.

The Supreme Court had before it the validity of the motor vehicle fuel law of Illinois, and the court held said law unconstitutional, being contrary to and in violation of the due process of law clause of the Fourteenth Amendment as well as the State Constitution.

In the opinion is cited many of the authorities found herein above.

Chicago Motor Club v. Kinney, 160 N. E., 163.

We submit that said motor vehicles fuel laws abridge the privileges or immunities of the plaintiffs and all said others, and also deprive them of their life, liberty, or property without due process of law, and also deny them of the equal protection of the law contrary to and in violation of the Fourteenth Amendment of the Federal Constitution.

The Federal Aid Legislation, prohibiting "tolls of all kinds," was adopted by the State. Such act of the State created a contract under which the public was protected and said Motor Vehicle Fuel Laws are unconstitutional.

It is admitted that 40% of the revenue received from the state is collected exclusively from said "tolls" for the use of Federal used highways, as all state highways and county roads are within the protection of said Federal aid legislation. Sec. 6 of said *Federal Highway Act* of November 9, 1921, c. 119, 42 Stat. 212, provides:

> "Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, * * * and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, * * *."

It has been shown that where any portion of any state highway or county road has been constructed or reconstructed under Federal aid, then all other remaining portions of said highways or county roads are embraced within the provisions of said Federal aid legislation.

The Federal government has paid out many hundreds of millions of dollars to the states, and the government received such money from the public through taxes, etc., and said public includes these appellants and all others similarly interested or situated.

Prior to the enactment of the "Rural Post Road Act" of 1916, congress had before it the decisions of this Court of what a "toll" was and the attempts of states to take advantage not only of the United States, but also the public.

We cite a few decisions:

This Supreme Court had occasion to interpret the provisions of the laws of Pennsylvania, Ohio and Maryland, relating to the Cumberland Road, and the Acts of Congress transferring such road to the respective States. The defendants in error had contracts for carrying the mail. This Court affirmed the judgment of the Circuit Court and held that the provisions of such contract between the State and the Federal government could not be modified or changed by subsequent acts of the legislature of the State. In the opinion of the Court delivered by Mr. Chief Justice Taney, it is said:

> "Now, as this was well known to the parties, can it be supposed that when Pennsylvania, by her Act of 1831, proposed to take the road, and keep it in repair from the tolls collected upon it, and exempted from the toll carriages laden with the property of the United States, she yet intended to charge it upon the mails? That in return for the large expenditures she required to be made, before she would receive the road, she confined her exemption to matters of no importance, and reserved the right to tax all that was of real value? And when Congress assented to the proposition, and incurred such heavy expenses for repairs, did they mean to leave their mails through Maryland and Pennsylvania still liable to the toll out of which the road was to be kept in repair? Upon this point the Act of Congress of March 3rd, 1835, is entitled to great consideration. For it was under this law that the States finally took possession of the road and proceeded to collect the toll. By so doing they assented to all the provisions contained in this Act of Congress; and one of them is an express condition that the United States should not thereafter be subject to any expense in relation to the road. Yet under the argument, the expenses of the road are to be defrayed out of the tolls collected upon it. And if

the mails in Pennsylvania and Maryland may be charged, it will be found that instead of the entire exception, for which the United States so expressly stipulated, and to which Pennsylvania agreed, a very large proportion of the expenses of repair will be annually thrown upon them. We do not think that either party could have intended, when the contract was made, to burden the United States in this indirect way for the cost of repairs. So far as the general government is concerned, it might as well be paid directly from the treasury. For nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Post Office Department * * *.

"In either case it is not free from expense in relation to the road, according to the compact upon which it was surrendered to and accepted by the States."

In such case the acts of Pennsylvania charging and collecting certain tolls were held void.

Searight v. Stokes, et al., 3 How. 151, 168, 11 L. Ed. 537, 545.

The State of Ohio endeavored by subsequent legislation to charge tolls on passengers on mail coaches. This Court held such law of Ohio was void, being in contravention of the Acts of Congress and the State of Ohio relating to the surrender and acceptance of the Cumberland Road.

Neil, Moore & Co. v. Ohio, 3 How. 721, 11 L. Ed. 800.

Again the State of Maryland endeavored to impose a toll upon all passengers in mail coaches, and if such toll was not paid, a toll of one dollar for each coach was charged whenever such coach passed over the road.

This Court declared such toll was inconsistent with the compact between Maryland and Congress. In such action Achison was the owner and operator of the mail coaches and carried passengers therein.

Achison v. Huddleson, 12 How. 294, 13 L. Ed. 993.

Congress granted public lands to the States in aiding the construction of railroads on the condition that such railroads were "public highways for the use of the Government, free from all tolls or other charge for transportation of its property or troops." The question presented to this Court for consideration was whether or not such condition "free from all tolls or other charge for transportation of its property or troops" includes the free use of the road alone, or transportation also. Mr. Justice Bradley, in delivering the opinion of the Court, said:

> "In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and when Congress, in granting lands in aid of such a road, declared that the same shall be and remain a public highway for the use of the Government of the United States, it only means that the Government shall have the right to use the road, but not that it shall have the right to require its transportation to be performed by the railroad company. And when this right of the use of the road is granted 'free from all toll or other charge for transportation of any property or troops,' it only means, that the Government shall not be subject to any toll for such use of the road."

In the opinion the Court cites a number of Acts of Congress in which the same provisions regarding toll were expressed, and all of such provisions provided for the free use of such highways for the transportation of property or troops free from all toll or other charge.

Lake Superior, etc., R. R. Co. v. U. S., 3 Otto, 442, 23 L. Ed. 965.

In Oregon the Federal Government had donated thousands of acres of public lands for the sole purpose of having constructed a post road from the Pacific Ocean to the Idaho line, with the only restriction, as far as the Government was concerned, freedom from tolls in connection with mails and the movement of troops, yet after some years and after the Government had parted with title to public lands in the State, it found no post road and no benefits derived from such land grant.

U. S. v. California & Oregon Land Co., 148 U. S. 31, 37 L. Ed. 354;
U. S. v. Dalles Military Road Co., 140 U. S. 599, 35 L. Ed. 561.

The following decisions show that the public had been or could be charged exorbitant fees for the use of public highways.

Mr. Justice Bradley delivered the opinion of the Court:

> "Whether, in addition to this, Congress, under the power to establish post roads, * * *, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland road and other similar

works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such a power, if it exists."

In such case the Court had for consideration the question of whether or not the PUBLIC had no remedy against exorbitant tolls. The Court also held that the State itself could build such highway and could assess a passenger whatever toll it desired unchallenged, and such rights of the State, to charge toll on its roads and canals, arises from its ownership thereof. "It gives them being. It has a right to exact compensation for their use. * * * The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it."

Balt. & Ohio R. R. Co. vs. Maryland, 21 Wall. 456, 475, 22 L. Ed. 678, 684.

In speaking of the charge for wharfage, which had to be borne by the public, this Court declared that it had no jurisdiction to regulate such matters, even if the charges for the use of the wharves were exorbitant. In the opinion of the Supreme Court, delivered by Mr. Justice Blatchford, it is said:

"If the state laws furnish no remedy (in other words, if the charges are sanctioned by them), then, as before stated, it is for Congress, and not the United States Courts to regulate the matter, and provide a proper remedy. Such an interposition may become necessary; for although the imposition of unreasonable wharfage by a City or a State is

always the dictate of a suicidal policy, the temptation of immediate advantage under stringent pressure will often lead to its adoption."

Ouachita, etc., Packet Co. v. Aiken, 221 U. S. 444, 449, 30 L. Ed. 976, 978.

The State of Michigan, in 1852, enacted a law and adopted all the conditions expressed in such Federal Act. The Federal Government took over such canal and demanded an accounting from the State of certain properties, including about sixty-eight thousand dollars, which the State had collected as toll and had on hand. Mr. Justice Peckham, in delivering the opinion of the Court, said:

"Evidently, it was not supposed that the state was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.

"Defendant refers to certain grants of land made to Illinois, Indiana and Ohio, and perhaps to some of the other states, where such grants were made to aid in the construction of canals in those states, and where possible profits from the construction of such canals were within the contemplation of the various grants. But in the acts referred to there are no restrictions upon the tolls which the states may charge for the use of their respective canals, the only limitation imposed being that the government should have their free use for the passing of its vessels; while, in this act, the tolls which the state may charge are to be only such after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge and the repairs thereof."

United States v. Michigan, 190 U. S. 379, 399, 400, 47 L. Ed. 1403, 1110, 1111.

The above citations show that Congress enacted said Act of 1916 to protect the public against any "toll" of

any kind, and these appellants and said all others, using said Federal aid highways by their motor vehicles, are the public, who are to be protected against any "toll" to be charged against their said use. If not, why did Congress simply provide that all highways constructed or reconstructed under said Federal Act should be "free from all toll or other charge for transportation of any property or troops"? Because the public is to enjoy the free use of said highways without any "toll".

As was said by Mr. Justice Bradley in *Ouachita, etc., Packet Co. v. Aiken*, supra, "It is for Congress * * *to regulate the matter, and provide a proper remedy." So Congress regulated the use of Federal aided highways and provided the remedy, to-wit, the prohibition against "tolls of all kinds" for the use of said Federal aided highways.

The legislature in 1925 referred to the people to raise the charge of 2 cents per gallon under said law of 1923, to 3 cents per gallon, and the people in November, 1926, voted not to raise such additional one cent per gallon. In the face of such vote, the legislature passed said law, Chap. 795, *Laws of 1927*, and the people, using the highways by motor vehicles, are paying 3 cents per gallon of said motor vehicle fuel.

During the year 1928, the State has received more than $32,000,000.00 from such exactions, "tolls," and it is admitted that $12,800,000.00 thereof was received from the use of Federal aid highways, and the balance, $19,200,000.00, was collected from the use of streets within the limits of municipalities.

In addition the State collected at least $10,000,000.00 from registration fees and licenses. Congress never in-

tended that the State should make a profit out of the money paid to it by said Federal aid legislation.

Every dollar of said $42,000,000.00 is expended on Federal aid highways and not on the streets of municipalities.

It is shown that the State is increasing the cost of using said Federal aided highways, by increasing the charge of motor vehicle fuel and licenses. Congress never intended to receive back one dollar from the millions and millions of dollars which have been and are now being appropriated for the benefit of the public. The Acts of Congress have shown, as set out in this brief, that it has been and is now its desire to do away with and abolish "tolls of all kinds" for the use of internal improvements. The States are acting in the construction of such Federal aided highways as trustees for the public, and of the Federal Government, and the public are entitled to receive the benefits of the use of such Federal aided highways without paying to the States any charges for such use.

It is preposterous to claim that the States can reimburse themselves for their share in the construction of said Federal aided highways, and in such manner recover back not only their share, but also in the future to receive a profit on such construction.

The said motor vehicle fuel laws are unconstitutional, being contrary to and in violation of the said Federal aid legislation, adopted by the State, and the contract made by the State with the United States for the benefit of the public, and also such laws are unconstitutional, being contrary to and in violation of the due process clause of the Fourteenth Amendment.

Ex parte Young, 209 U. S. 123, 52 L. Ed. 714;
Western U. Tel. Co. v. Andrews, 216 U. S. 165, 54 L. Ed. 430;
Home Tel. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510;
Looney v. Crane, 245 U. S. 178, 62 L. Ed. 230;
Chicago Gt. Western R. Co. v. Kendall, 266 U. S. 94, 69 L. Ed. 188.

VI.

The provisions of said State Laws are unconstitutional and void, being contrary to and in violation of the Constitution of the State of California. (Appendix, p. 11, l. 23.)

We call the attention to this Court that the Supreme Court of California has in an opinion delivered by Justice Seawell, said:

> "The rule contended for by appellants that all tax legislation must be construed most strictly against the state and most favorable to the taxpayers must be conceded."
>
> *Riley v. Havens*, 193 Cal. 423.

The titles of said state laws do not disclose the sole subject or purpose thereof. The titles are to regulate and license a business, while the sole subject was to collect a revenue from all consumers of motor vehicle fuel, and then to refund all the amounts from those consumers who do not use the highways by motor vehicles or were exempted. (Appendix, p. 12, l. 24.)

Also said refunds were paid out in violation of Art. IV, Sec. 25. (Appendix, p. 12, l. 35.)

Also said refunds were paid out in violation of Art. IV, Sec. 22 and Sec. 31, as the object also was to benefit

private persons, and not for public purposes. (Appendix, p. 11, f. 33.)

> "To promote a public purpose by a tax levy upon the property in this State, is within the power of the legislature; but the legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way. Legislative power of taxation is not illimitable. It can be used only in aid of a public object—an object which is within the purpose for which governments are established. In the vigorous language of the Supreme Court of Pennsylvania, 'the legislature has no constitutional right to levy a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder.'"
>
> *Sharpless v. Mayor, etc.*, 21 Penn. 168.

At the least, then, two heterogeneous subjects are embraced in the act, one of which is not expressed in the title, and they cannot be segregated. The title does not express the objects of legislation embodied in the provisions of the act. It is, therefore, narrower than the body of the act, and fails to impart that notice of the measures enacted, which the Constitution requires. To prohibit such legislation was the sole end and aim of the constitutional requirement. "The practice" says the Supreme Court of Missouri, "of comprising in one bill subjects of a diverse and antagonistic nature, in order to combine in its support members who were in favor of

particular measures, but neither of which could command the requisite majority on its own merits, was found to be not a corruptive influence in the Legislature itself, but destructive of the best interests of the State. But this was not more detrimental than that other pernicious practice, by which, through dexterous and unscrupulous management, designing men inserted clauses in the bodies of bills, of the true meaning of which the title gave no indication, and by skillful maneuvering urged them on to their passage. These things led to fraud and injury, and it was found necessary to apply a corrective in the shape of a constitutional provision." *(City of St. Louis v. Tiefel,* 42. Mo. 590.) This provision has been framed in the constitutions of many of the States of the Union; and Courts, whenever it has come before them, have liberally construed it as the will of the people in the interests of honest legislation.

People v. Parks, 58 Cal. 624, 639, 640.

We also refer to the facts, arguments and citations found in paragraph IV in support of our position in this paragraph.

In addition (see appendix, p. 10, f. 29) the legislature well knew that said motor vehicle fuel laws were unconstitutional, as in Sec. (d) of 77 of the "Motor Vehicle Act" of 1923, as amended in 1927, it declared, in case the Courts decide said fuel laws are held unconstitutional, then the fees in (a) and (c) of the said Sec. 77, shall be increased so as to make up the loss of such revenue.

VII.

The acts of Appellee enforcing said State Laws were performed under color of his office, and such acts are void and illegal, and the Appellants were entitled to a temporary injunction.

It is admitted that said appellee is forcing all consumers to pay such 3 cents per gallon and such collections amount to many thousands of dollars daily, and he is paying out many thousands of dollars as refunds, and permit the distributors to have the use of at least said $4,000,00.00, as well as said one per cent.

The appellants and said others similarly interested or situated have been and are daily suffering irreparable loss and damage.

We refer to the above paragraphs of our brief, in which the facts, arguments and citations are set out therein, showing our position.

VIII.

The action of the Lower Court, in granting the motion to dismiss the bill of complaint, is erroneous, and refusing the oral request that the Court file a written opinion.

We have already stated our position and we refer to the above paragraphs of our brief, in which the facts, arguments and citations are set out therein, except the refusal to file a written opinion. The motion to dismiss contained six grounds (see R. 14, 15.)

The appellants do not know what grounds the lower court based its order on, and they could not present an amendment.

We submit that the parties, as well as this Court, are entitled to a written opinion, so as to advise them upon what grounds such motion to dismiss had been granted.

In Conclusion.

We submit that this Court should reverse the order denying said motion for an interlocutory injunction and granting the said motion to dismiss, and it should direct the lower court, consisting of three same judges, to issue a permanent injunction against said appellee as prayed in the bill of complaint, and decree that said motor vehicle fuel laws be declared unconstitutional and void, and said appellee be directed and commanded to pay into the registry of the Court all moneys which he has received since March 31, 1928, and for such allowances, distributions and payments as may be hereafter determined, awarded and decreed, and for all other proper and further relief in the premises.

Respectfully submitted,

EDWIN C. EWING,
W. R. CRAWFORD,
Solicitors for Appellants.

1

APPENDIX

"An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and other parts of acts inconsistent herewith.

The People of the State of California do enact as
2 follows:

Section 1. The following words, terms and phrases shall, whenever used in this act, have the meaning set forth in this section.

(a) "Motor Vehicle" shall include any vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel.

(b) "Motor vehicle fuel" shall include all gasoline, distillate, benzine, naptha, liberty fuel and other volatile and inflamable liquids produced or compounded for the
3 purpose of, or which may be used in operating or propelling motor vehicles except kerosine and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles.

(c) "Distributor" shall mean and include every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers

in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has been imported into this state, shall distribute or sell the same, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(d) "Service station" is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles.

Sec. 2. Every distributor shall within ten days after this act becomes effective and thereafter any person, firm, association or corporation before becoming a distributor shall register as such with the state board of equalization on forms to be prescribed, prepared and furnished by said board of equalization, and said state board of equalization shall issue to such distributor a license which shall be valid until revoked by said board as hereinafter provided.

Sec. 3. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and

thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling.

(SECTION 4 AMENDED, being Chap. 359, Laws of 1925.)

Sec. 4. License taxes herein required to be paid shall be paid in quarterly instalments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock P. M. on the forty-fifth day after the end of such quarter, and ten

10 per cent penalty shall be added thereto for delinquency.

Sec. 6. Statements to be filed by the distributor. Tax to be computed therefrom. Within 20 days after the quarter ending December 31, 1923, and within 20 days after each following quarter, filed on forms furnished by state board of equalization, a verified statement, etc. The state board of equalization shall compute tax due and extend same on tax roll and on or before 30 days from and after close of each quarterly period shall deliver said tax roll to the state controller who shall give
11 due notice of the date when said taxes shall become due.

(Section 7 Amended in 1925, being Chap. 359, Laws 1925.)

Sec. 7. All motor vehicle fuel distributed by any distributor to any of its service stations, or other agencies, tank trucks, wagons, boats, barges, or other facilities operated by such distributor in this state shall for the purpose of this act be considered in the same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold and de-
12 livered by such distributor; *provided,* that the amount of motor vehicle fuel distributed during any quarter to any agency, tank truck, wagon, boat, barge, or other facility operated by the distributor is hereby defined to mean the amount thereof thereafter found to have been sold and delivered therefrom during such quarter plus one-ninety-ninth thereof but excluding therefrom deliveries to service stations operated by such distributor.

All motor vehicle fuel used by a distributor in the operation of any motor vehicle shall for all the purpose of this act be considered in the same manner and the same license tax shall be paid upon such motor vehicle

13 fuel as though the same had been sold by such distributor; *provided, however,* that in lieu of the collection and refund of the tax upon such fuel used for exempt purposes a credit may be given such distributor upon his tax return and assessment.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel.

(Section 10 Amended, being Chap. 359, Laws of 1925,
14 and Chap. 716, Laws of 1927.)

Section 10. The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and
15 exported for use outside of the state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof (for official use of said government), but every distributor shall be required to report such exports and sales to the state board of equalization in such detail as that board shall require.

(Section 11, Amended, being Chap. 359, Laws of 1925, and Chap. 716, Laws of 1927.)

Sec. 11. *Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of*

California or export the same for use outside of this state; also any person, firm, association or corporation who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed and repaid the amount of such tax paid by him, or if upon presenting to the state controller an affidavit accompanied by the original invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California. The said state controller, upon the presentation of such affidavits and such invoices or vouchers, shall cause to be paid to such consumer, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on the motor vehicle fuel so purchased or so used. All such applications shall be filed with the state controller within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after such twelve months shall not be considered for any purpose by the state controller, the treasurer or the State of California.

Sec. 13. Motor Vehicle Fuel Fund created. Amount to go to counties for road purposes. Semi-annual distribution to counties. Supervisors to report distribution

of moneys. Remainder paid into state highway maintenance fund. All such money from such tax shall be paid by the counties into a special road improvement fund and used exclusively in the construction and maintenance of roads, bridges and culverts. Such money to be distributed to the counties by the state controller semi-annually in May and November of each year. Supervisors of the counties to report distribution of moneys. Remainder of money from such tax paid into state highways maintenance fund which fund is created for the maintenance, repair, widening, resurfacing and reconstruction of the state highways and of roads and highways in state parks.

(Section 14 Amended, being Chap. 359, Laws of 1925.)

Sec. 14. *Any person, firm, association or corporation or any officer or agent thereof failing to pay the tax as herein provided, or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this state declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.*

The state board of equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act."

Sec. 15. Constitutionality. Validity sustained if any section, etc., held to be unconstitutional.

(Section 18. An Additional Section Enacted in 1925)

Sec. 18. All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provisions of section three thousand six hundred sixty-nine of the Political Code.

CHAPTER 795, p. 1565, Laws of 1927.

An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, and adopting those provisions, not inconsistant herewith, of an act entitled, "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith," approved May 30, 1923, as amended and approved May 23, 1925.

(Approved by the Governor, May 26, 1927. In effect July 29, 1927.)

The people of the State of California do enact as follows:

Section 1. In addition to the two cents license tax provided for in an act entitled "An act * * *," and referred to herein as the "original act", every distributor, as defined in said "original act", shall pay a license tax to the state controller of this state of an additional one cent for each gallon of motor vehicle fuel, as defined in said "original act", said license tax to be computed, paid and collected in the same manner at the same intervals of time as in said "original act" provided.

All moneys received by state controller from payment of the additional license tax under the provisions of this act shall be by him deposited in the state treasury of this state and credited to the "motor vehicle fuel fund" created in said "original act" and shall be subject to the payment of one-third of the refunds provided for in section eleven of said "original act" in the manner therein provided. After the payment of said proportion of said refunds, the balance of said moneys received hereunder shall be by the state controller credited to the "State highway construction fund," which fund is hereby created.

Sec. 2. All moneys so credited to said state highway construction fund shall be allocated and expended by the California highway commission of this state for the acquisition of rights of way for and the construction and improvement of state roads and highways in accordance with that certain act entitled "An act to provide for the acquisition of rights of way for and the construction, maintenance and improvement of state highways, classifying the highways in the state system and allocating and directing the expenditure of funds for the construction, maintenance and improvement of state highways," passed at the forty-seventh session of the Legislature or as subsequently amended, and in the event that said last mentioned act shall not be enacted into law at the forty-seventh session of the Legislature then and in event the license tax of an additional one cent for each gallon of motor vehicle fuel imposed under this act shall cease and be inoperative.

All moneys withdrawn from the state highway construction fund shall be upon warrants drawn by the state

28 controller upon demands made by the said California highway commission and allowed and audited by the state board of control of this state.

Sec. 3. All provisions, penalties and requirements now contained in said "original act", not inconsistent herewith, are hereby adopted and made a part of this act, notwithstanding any repeal or amendment of said "original act", hereafter.

MOTOR VEHICLE ACT, BEING CHAP. 266, LAWS
29 OF 1923, AS AMENDED.

(Section (d) 77 of said law)

"(d) If the license tax provided for by that certain act entitled "An Act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith," heretofore adopted by the Legislature at its forty-fifth session is
30 held by the Supreme Court of the State of California, or by the Supreme Court of the United States, to be unconstitutional, then beginning with the first year next succeeding the date upon which such decision becomes final there shall be paid upon and for the registration and reregistration of every motor vehicle with the division of motor vehicles, in addition to any other fees imposed by law, a registration fee of five dollars for every electric motor vehicle and for every other motor vehicle a fee amounting to the sum of forty cents for each horsepower or major fraction thereof of such motor vehicle and a proportionate amount thereof for the regis-

tration of such vehicle for a period of less than one year. The horsepower of any motor vehicle, except electric or steam driven motor vehicles, shall be determined by the formula commonly known as that of the Association of Licensed Automobile Manufacturers (A. L. A. M.) being as follows: Square the diameter of the cylinder in inches, multiply by the number of cylinders and divide by two and five-tenths; provided, that for the purpose hereof the horsepower of any steam driven motor vehicle shall be the horsepower rating fixed and advertised by the manufacturer thereof. In the event that the registration fees for motor vehicles and fees based on horsepower as hereinabove specified shall be collected, all such fees shall be paid into the motor vehicle fund of the State of California and shall be distributed and used for such purposes as may be provided by law for the distribution and use of such motor vehicle fund; and provided further, that in the event the provisions of the section, relative to registration fees, based upon horsepower rating shall become effective the provisions of this section contained in subdivisions (a) and (b) shall be deemed to be superseded."

"The State of California duly adopted a Constitution and the following provisions are found:

Art. IV, Sec. 22:

"No money shall be drawn from the treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the Controller; and no money shall ever be appropriated or drawn from the

state treasury for the purpose or benefit of any corporation, etc."

Art. IV, Sec. 24:

"Every act shall embrace but one subject, which shall be expressed in its title. * * * No law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be reenacted and published at length as revised or amended;"

Art. IV, Sec. 25:

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * * * *

[fol. 5] Tenth. For the assessment or collection of taxes. * * * *.

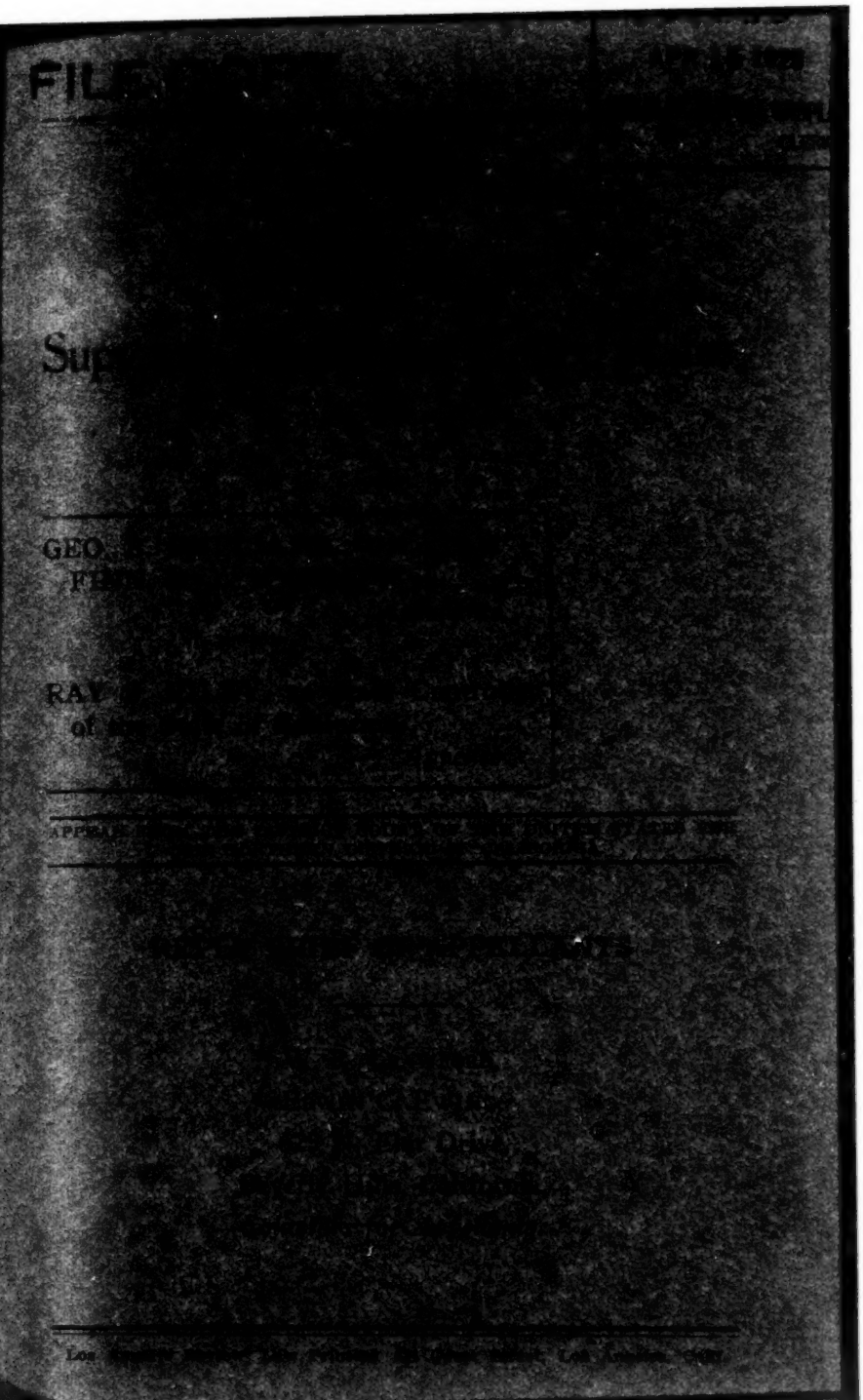
Fifteenth. Refunding money paid into the State Treasury.

Nineteenth. Granting to any corporation, association, or individual any special or exclusive right, privilege or immunity.

Twentieth. Exempt property from taxation."

Art. IV, Sec. 31:

"The legislatute shall have no power to give or to lend, or to authorize the giving or lending, of credit of the state * * *, in aid of or to any person, association, or corporation, * * *, nor shall it have power to make any gift of any public money or thing of value to any individual, etc., whatsoever. * * *."



SUBJECT INDEX

PAGE

I.

Replying to Appellee's "The California Highway System in General" 1

II.

Id. "The State Acts of 1923 and 1927 do not Exact a 'Toll' within the Meaning of the Federal Aid and Highway Acts" 5

III.

Id. "The Federal Aid Act and the Federal Highway Act Have not been Violated" 13

IV.

Id. "The Federal Government has Acquiesced in the Action of California and other States" 19

V.

Id. "Appellants have no Standing in Court" 22

VI.

Id. "The State Law is Consistent with the Fourteenth Amendment" 23

VII.

Id. "The State Law is Consistent with the State Constitution" 24

VIII.

Id. "Injunction Relief Should be Denied" 27

In Conclusion 29

CITATIONS AND AUTHORITIES PAGE

B

Bacon Service Corp. v. Huss, 199 Cal. 21 3
Buck v. Kuykendall, 276 U. S. 205, 69 L. ed. 623 19

C

California Constitution, Sec. 11, Art. XI 3
Callison v. Hedrick, 15 Grat. 244 2
Carter v. Clark, 89 Ind. 238 2
Chicago G. W. R. Co. v. Kendall, 266 U. S. 96, 69 L. ed. 188, 189 27-29
City of Madera v. Black, 181 Cal. 306 14
Comm's. of Dodge Co. v. Chandler, 6 Otto. 205, 24 L. ed. 625 2
Comm. of Immigration v. Gottleib, 265 U. S. 310, 68 L. ed. 1031, 1033 14

D

Douglas v. Boonsbough, etc. Co., 22 Md. 219 2

F

Fishill v. Fishill, etc. Co., 22 Barb. 634 2

G

Grand Trunk W. Ry. Co. v. U. S., 252 U. S. 112, 64 L. ed. 484, 491 4

H

Hanover F. Ins. Co. v. Carr, 272 U. S. 179, 71 L. ed. 224 ....6, 15
Hill v. Wallace, 259 U. S. 44, 66 L. ed. 839 27

J

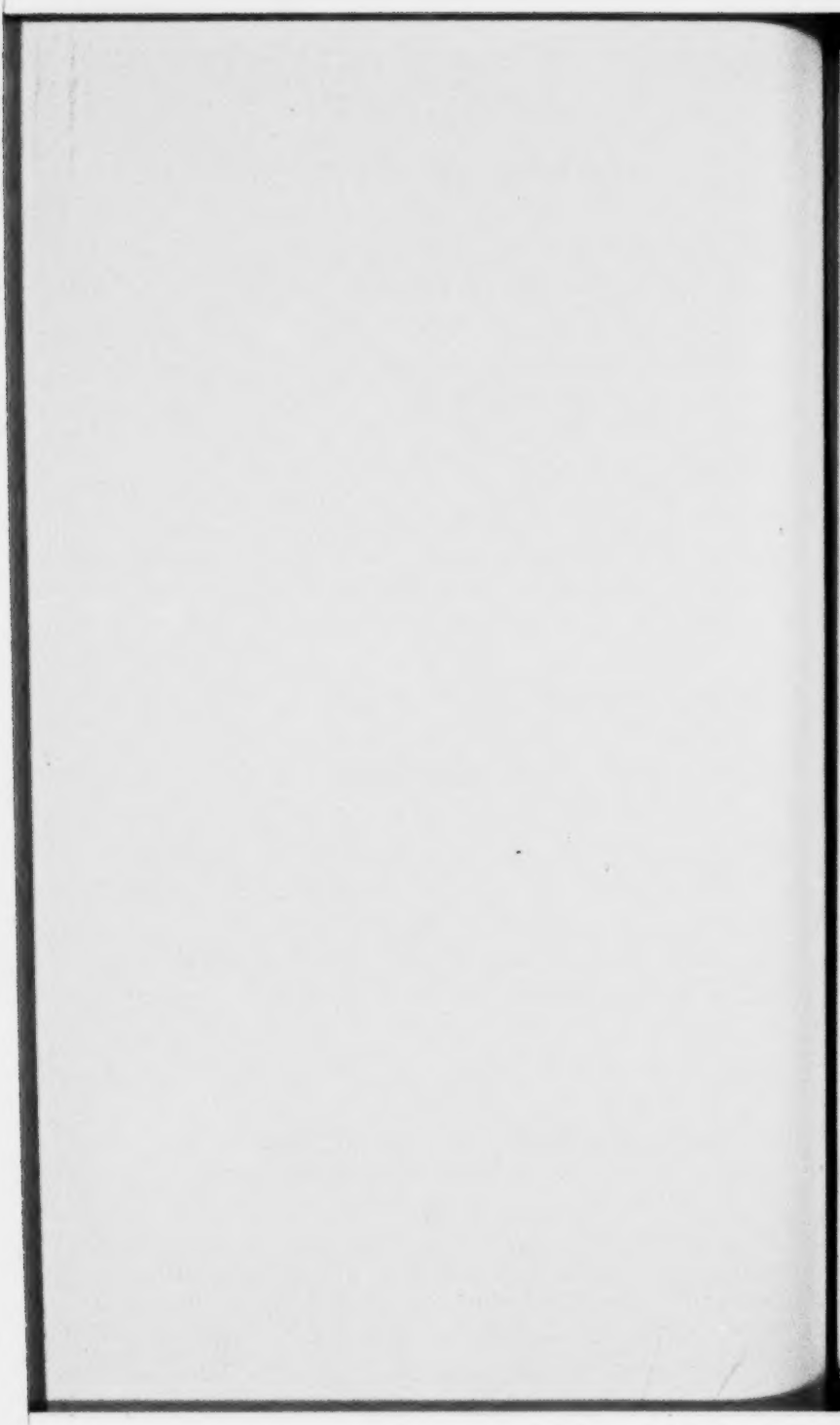
Judicial Code, Sec. 24 23

L

Lake Superior Ry. Co. v. U. S., 3 Otto 442, 23 L. ed. 965 7
Latimer v. U. S., 223 U. S. 223, 56 L. ed. 526 7

M

Meyer v. Wells Fargo Co., 223 U. S. 298, 56 L. ed. 445 27
Missouri P. R. Co. v. U. S., 271 U. S. 603, 70 L. ed. 1109.... 13
Mordecai v. Board of Supervisors, 183 Cal. 434..... 26
Motor Vehicle Act of 1923, Sec. 77 (d) 20



PAGE

O

Old Homestead Bakery v. Marsh, 75 Cal. 247 5
Oren ex rel Barbour, 120 Mich. 550 21

P

Pauton, etc. v. Bishop, 11 Vt. 190 2
People v. Jacobson, 79 Cal. 166 2
Perrine v. Ches. & D. C. Co., 9 How. 172, 13 L. ed. 92 23
Pierce Oil Corp. v. Hopkins, 282 Fed. 235, 264 U. S. 137, 68 L. ed. 593 8-11
Portland v. Kozer, 108 Ore. 375 16

R

Robert v. Police Court, 148 Cal. 131 26

S

Schuler, in the Matter of, 167 Cal. 259 21
Smith v. Scruggs, 79 Ark. 544, 69 S. W. 679 10
Spraigue v. Thompson, 118 U. S. 94 25
Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753 8
State v. Maine, 27 Conn. 691 2
State v. New Boston, 11 N. H. 407 2
Stork, in the Matter of, 167 Cal. 294 22

T

The Emporium v. San Mateo, 177 Cal. 622 14

U

U. S. v. Michigan, 190 U. S. 379 19

W

Walker v. Caywood, 31 N. Y. 51 2
Wong Haue, 108 Cal. 680, 683 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
Appellants,

vs.

RAY S. RILEY, as State Controller of the State of California,
Appellee.

REPLY BRIEF OF APPELLANTS

Under the caption:

I.

"The California Highway System in General"

on page 5 of the appellee's brief, the appellee cites certain statutes and the Constitution of California. Prior to the adoption of the Rural Post Road Act of 1916 by the State in 1917, the State had issued $33,000,000.00 of bands for the acquisition and construction of a system of state highways and not a dollar of such amount was used on the streets of municipalities. After 1917, the state in 1919 adopted a state bond issue of $40,000,000 for the construction of certain additional state highways. Not a dollar went into streets of municipalities.

So that the state had constructed state highways by taxes.

The funds for constructing and maintaining highways are drawn from different sources, the one from travelers by a toll, the other from the community by a tax.

State v. Maine, 27 Conn. 691;
State v. New Boston, 11 N. H. 407;
People v. Jacobson, 79 Cal. 166;
Fishill v. Fishill etc. P. S. R. Co., 22 Barb. 634;
Carter v. Clark, 89 Ind. 238;
Walker v. Caywood, 31 N. Y. 51;
Douglas v. Boonsbough etc. Co., 22 Md. 219;
Callison v. Hedrick, 15 Gratt. 244;
Pauton, etc., Co. v. Bishop, 11 Vt. 190;
Comrs. of Dodge County v. Chandler, 6 Otto, 205, 24 L. Ed. 625.

In 1917 at the time the state had accepted the provisions of said Rural Post Road Act of 1916, the state had constructed the public highways outside of municipalities by the proceeds of bond issues. amounting to $33,000,000, and the state in 1919 desired to increase the Federal aid, so it issued the $40,000,000.

The Federal aid since 1917 had been used, not only for new construction, but also for the reconstruction of public highways, not only on state highways, but also on county roads all as provided by said Federal Act (R. 3, 4, 5).

In 1923, the state changed its method of raising money by bonds and enacted the Motor Vehicle Act of 1923, the Motor Vehicle Transportation License Act of 1923 and the Motor Vehicle Full Tax Act of 1923, and thereafter said Motor Vehicle Act and the Motor Fuel Act have been amended so to raise the charges, and the Transportation License Act has been repealed and the

Constitution has been amended by Section 15 of Article XIII, so as to take the place of said Transportation Act. We have been informed that the state will receive this year about $10,000,000 collected from the Motor Vehicle Act, and about $32,000,000 from the Motor Fuel Act (original brief, page 39), and the state will pay out from the Motor Vehicle Act about $2,000,000 for the entire cost of the regulating and administrating the Act, and the state will only pay out a few thousand dollars to collect the said $32,000,000.

The streets within municipalities are not constructed, improved or maintained by the State. (R. 6, 7, 8.)

Sec. 11 of Article XI of the *Constitution* provides:

> "The legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

See *Bacon Service Corp. v. Huss,* 199 Cal. 21, cited in our brief, p. 29.

In our complaint we alleged that "All of the highways of the State of California are post roads, and the public highways of said state are covered by the said provisions of said Acts, aforesaid." (R. 3, 4.)

The appellee in his brief, pages 11 and 12, attacks the restrictions in the Federal Acts and says the "limited Federal aid" does not give much relief. The Grand Trunk Western Ry. Co. had the same desire to obtain benefits, but after obtaining the benefits, it endeavored to repudiate.

Mr. Justice Brandeis delivered the opinion:

"The obligation of a land-aided railway to carry the mail at a price fixed by Congress is a charge upon the property. The public lands were granted to Michigan to aid the construction of certain railways upon certain conditions. The legislature of Michigan could not dispose of the lands except in accordance with the terms of the grant. By the Act of February 14, 1857, it accepted the grant and enacted legislation to give legal effect to the conditions of it. Section 4 of the act is as follows: Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charges upon the transportation of any property of the United States; and the United States mail shall be transported over said railroads, under the direction of the Postoffice Department, at such price as Congress may by law direct. * * *" The order of the board of control of May 1, 1873, directing the transfer of the land to the Port Huron & Lake Michigan Company, and the patent issued by the governor, were founded upon the authority of Section 11 of the act; and under date of May 30, 1873, the company accepted the lands with the burden they imposed. The railroad, whose owners and constructors accepted aid derived from these lands, became charged by operation of law with the burden of transporting the mails. The question whether that company would have accepted the land with its burdens if it had foreseen the invalidity of the title to the western lands is wholly immaterial. The burden attached upon the acceptance of any aid whatsoever, no matter how disproportionate to the cost of constructing the portion so aided."

Grand Trunk Western Railway Company v. U. S., 252 U. S. 112, 124, 125, 64 L. Ed. 484, 491.

II.

"The State Acts of 1923 and 1927 Do Not Exact a 'Toll' Within the Meaning of the Federal Aid and Highway Acts." (Appellee's Brief, p. 13.)

Under this caption the appellee fails to show that the said Motor Vehicle Fuel exactions are not "tolls", but declares the *Old Homestead Bakery v. Marsh,* 75 Cal. 247 had no bearing.

We refer to the excerpt of said case as found in our brief on pages 12, 13, 14 and 15. The decision was based upon the argument of U. S. Webb, Attorney General of the State representing the defendant Marsh, and who now represents the defendant (now appellee) Riley in the instant case. Mr. Webb claimed that the Old Homestead Bakery must pay the license under subdivision (b) of Sec. 77 of the Motor Vehicle Act, as they use electric motor propelled vehicles and this charge is collected for the privilege of using the public highways, and this charge is payable in advance to said use and it is a flat charge, because the owners or operators of gas motor vehicles must pay in advance said 2 cents on every gallon before they can use the public highways.

In the opinion we find "the legislature of 1923 passed an act establishing an entirely new system for the raising of revenues for said purpose, so far as gas and other fuel cars are concerned, by requiring, practically, the owners or operators of all such cars to pay to the state, in addition to nominal registration fees, two cents per gallon for all gas consumed in the operation thereof" (our brief, p. 13).

The said exactions are revenue measures. Said exactions are charges against the said owners or operators and not against the other consumers of gas who do not use the highways by gas cars. These exactions are not imposed upon sales of gasoline, generally, "but only when the commodity is sold for consumption in the operation of vehicles upon the highways. A charge so limited amounts to same thing, in substance, as a toll for the use of the highways" (see our brief, p. 22, in excerpt of opinion of the Justices of N. H., and also the citations found in our brief under III, p. 17, and V, p. 32.)

By such decision, as affirmed by the Supreme Court of California, the said owners or operators must pay a "toll" before they can use the highways by their gas cars.

The appellee simply states that under said caption the said State Acts do not exact a "toll" within the meaning of the Federal Acts, to-wit: *"That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds,"* and he cites a number of authorities which do not support his position.

Said decision in *Old Homestead Bakery v. Marsh* is binding upon this Court, and this Court is to determine whether the said Motor Fuel Acts, so construed by the State Courts, are in violation of the said Federal Aid Legislation prohibiting "tolls of all kinds," the 14th Amendment, and the California Constitution.

Hanover F. Ins. Co. v. Carr, 272 U. S. 179, 71 L. ed. 224.
See our original brief, p. 16.

We have cited many decisions of what is a "toll" and also the meaning of "free from toll," etc., in our original brief and also in this brief, and we refer to our original

brief on that question. When Congress enacted the Rural Post Road Act of 1916, it had before it the said decisions and many others dealing with the question of "tolls" and the meaning of "free from tolls," etc., and it adopted the provision prohibiting "tolls of all kinds" well knowing what it meant, and to so prevent any question added "of all kinds" to the word "tolls".

The Supreme Court of the United States had interpreted such term in many decisions, and Congress adopted such construction in the said Federal Legislation.

Latimer v. U. S., 223 U. S. 223, 56 L. ed. 526.

The said term "free from tolls, etc." was expressly interpreted by this Court and this Court announced that it could not disregard "the long established usage of legislative expression," and without doing violence to language. The Court cited Acts of Congress on the question of tolls.

Lake Superior R. R. Co. v. U. S., 3 Otto 442, 23 L. ed. 965.

(We cited this case in original brief with excerpts, see p. 36.)

The appellee in his brief under this caption practically admits that such exactions are "tolls," but the prohibition of the Federal Aid Legislation does not protect the appellants. We will call attention to a few of the decisions cited by the appellee.

Kane v. New Jersey and *Hendrick v. Maryland.*

We cited said cases with excerpts in original brief, pages 18, 19. Both of said cases were instituted many

years before the Rural Post Road Act of 1916. The plaintiffs were non-residents and relied upon the Commerce Clause. This Court held that they must pay for regulation and also in addition a reasonable amount for the use of the highways, a "toll."

Pierce Oil Corporation v. Hopkins, 282 Fed. 235, affirmed by this Court, 264 U. S. 137, 68 L. ed. 593. We set out not only excerpts from said two decisions, but also the decision of *Standard Oil Co. v. Brodie,* 153 Ark. 114, 239 S. W. 753. The appellee in his brief, pages 18, 19, cited said *Pierce Oil Corp. v. Hopkins,* cases to support the following argument, to-wit: "The only one whom the state makes responsible for the tax is the distributor;" again, "An Arkansas statute required all sellers of gasoline for use in motor vehicles to collect a tax of one cent a gallon, etc. * * *. The Federal Court held that the tax was not levied against the purchaser, but was an excise tax on the privilege of making sales of gasoline, etc." (282 Fed. 253, 255, found on appellee's brief on page 21.)

The State of Arkansas enacted a law, exacting a charge of one cent per gallon on such motor fuel which was used exclusively by motor vehicles on the public highways. The following excerpt of such case is set out herein:

> "On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highways, and the extent of the use is measured by the quantity of the fuel con-

sumed, and the tax is imposed according to the extent of the use as thus measured.

"If it had been intended merely to tax the gasoline or its use, it would have been wholly unnecessary to describe the character of the use or the place where it was to be used, and the fact that the lawmakers incorporated these elements in laying the basis of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller nor upon the gasoline while in his hands, and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline nor upon the gasoline itself. * * * But, as we have already said, this is not a tax on gasoline, but on the use of the public highways of the vehicles mentioned and the case comes, therefore, within the doctrine announced by Judge Riddick in the Scruggs case, supra, that the tax on the article used does not constitute a tax on the article itself, for the privilege is not upon the article but upon the use of it on the public highway.

"It is, in effect, the use of the public highways that is taxed, and not the use of the article itself. * * *

"Our conclusion, therefore, is that, under a fair interpretation of the statute, it imposes, not a property tax, but a tax upon the privilege of using automobiles upon the public highways. * * *

"It is next contended that the due process clause of the Constitution of this State and of the United States is violated by the requirement laid upon the dealers in gasoline to collect and pay the tax. It must be remembered that the tax is not laid on the sale of the gasoline, nor upon the business of the dealer. The dealer is not required to pay the tax, but to collect it, keep and present an account thereof, and pay over to the county treasurer. * * *

"That principle is not ignored in the provisions of the statute now under consideration, for the dealer has ample opportunity to reimburse himself

in advance, by the collection of the tax before the commodity is delivered."

Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753.

Among other citations in the above case the Supreme Court of Arkansas cited and relied upon the Scruggs case, in which it is said:

"The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed."

Smith v. Scruggs, 79 Ark. 544; 69 S. W. 679.

The Circuit Court of Appeals also had occasion to pass upon the same Arkansas law, and we set out the following excerpt in the opinion:

"The claimed violations of the Fourteenth Amendment to the Constitution of the United States rests upon the assumptions that the tax is levied against the purchaser, and that the seller is required to pay the purchaser's tax, without benefit or reimbursement. The first inquiry is whether the seller does pay a tax which is levied against another. The Supreme Court of Arkansas, in the case heretofore cited, declared that the tax was not imposed upon the gasoline as property, nor upon the sale, nor upon the purchase, but was laid upon the privilege of the use of the vehicles mentioned in the act upon the public highways. * * *

"It becomes necessary to ascertain the actual effect of the statute, whatever name or description has been applied to it by the State Supreme Court (Standard Oil Co. v. Graves, 249 U. S. 389, 394, 39 Sup. Ct. 320, 63 L. Ed. 662), in order to determine whether it violates the Constitution of the United States. It is doubtless true that the amount of the tax usually does fall finally upon the pur-

chaser, because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. (Clark v. Titusville, 184 U. S. 329, 333, 22 Sup. Ct. 382, 46 L. Ed. 569.) It may also be conceded that what is ultimately gained by the purchaser for the amount of tax so included is the use of the highways for automotive vehicles propelled by gasoline."

Pierce Oil Corp. v. Hopkins, 282 Fed. (C. C. A.) 253, 255.

Such case reached this Supreme Court and the decree of the lower court was again affirmed and the following excerpt of the opinion of this Court was delivered by Mr. Justice Brandeis:

"The claim that the act violates the due process clause rests upon the argument that the tax levied is a privilege tax for the use of the highways by the purchasers; that the seller is required to pay the tax laid on the purchasers; that, unlike those cases where a bank is required to pay taxes assessed against stockholders or depositors (Citizens Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. Ed. 832, 30 Sup. Ct. Rep. 532; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. Ed. 147, 34 Sup. Ct. Rep. 31), the seller is not afforded the means of reimbursing himself; and that, moreover, the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense. A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a state which has, under its constitution, * * * is not prevented by the due process clause from imposing incidental burden."

Pierce Oil Corp. v. Hopkins, 264 U. S. 137, 68 L. Ed. 593.

The above excerpt from *Pierce Oil Corp. v. Hopkins,* 282 Fed., on page 255 shows the Federal Court did not hold that the tax was an excise tax on the privilege of making sales of gasoline, but did hold "that the tax was not imposed upon gasoline as property, nor upon the sale, nor upon the purchase, but was laid upon the privilege of the use of the vehicles mentioned in the act upon the public highways."

The excerpts from the decision of *Standard Oil Co. v. Brodie* and the decisions of *Pierce Oil Corp. v. Hopkins* in the Circuit Court of Appeal and in this Court show that *such tax is a "toll" for the privilege of using vehicles on the highways.*

The appellee cited on pages 21, 22 the case of *State v. Panhandle Oil Co.,* 147 Miss. 663. This case was taken to this Court and was reversed. *Panhandle Oil Co. v. Mississippi, 277* U. S. 218, 72 L. Ed. 857, ex rel Knox.

In the early days, the tolls were fixed by distances with different rates depending upon the capacity and weight of the vehicles, and the toll gatherers took the "tolls" and the travelers were compelled to stop at the designated places, but today travelers by motor vehicles only stop at the service stations after they have exhausted their motor fuel and pay the "tolls" in advance, for the distances they desire to travel, depending upon the capacity and weight of their motor cars. (R. 7.)

The appellee is aggrieved that the term "free from tolls of all kinds," is contained in the Federal Aid Legislature, and he asks this Court to change the meaning of said term, and the words thereof, which has been passed upon by this Court in many decisions. This Court recently had before it a case in which the appellant asked

this Court to change the meaning of words because of new conditions after the land-grant acts.

Mr. Justice Sutherland in delivering the opinion of the Court said:

> "It is said that railway postal cars originated after the passage of the land-grant acts. But it does not follow that such cars are not fairly within the meaning of those acts as essentially incident of transportation. The provision reaches into the future; and, while its meaning does not change, its application may well embrace new conditions and new instrumentalities which come within the scope of the terms employed. This is in accordance with the universal law of language. In a sense, words do not change their meaning; but the application of words grows with expansion of society."
>
> *Missouri P. R. Co. vs. U. S.*, 271 U. S. 603, 70 L. Ed. 1109.

III.

"The Federal Aid Act and the Federal Highway Act Have Not Been Violated." (Appellee's Brief, page 23.)

On page 23, the appellee contends that the term "free from tolls of all kinds" does not extend to occupational or privilege taxes, and also the appellants did not cite a single case that the Motor Vehicle Fuel Act of 1923 or 1927 imposes a "toll" contrary to the prohibition in the Federal Aid and Highways Act; he then cites a number of cases.

We say that the appellee had already made the same statement that "free from tolls of all kinds," and we refer to our former argument in this reply brief.

This Court again announced that:

> "The case, as the evidence shows, and it is not unnatural that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to the respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but follow it, without regard to the consequences."
>
> *Comm. of Immigration vs. Gottlieb,* 265 U. S. 310, 312, 68 L. Ed. 1031, 1033.

In our original brief, page 17, we had cited in the matter of Schuler, 167 Cal. 282, relating to the Motor Vehicle Act of 1913 and that the Supreme Court had followed the Ft. Smith vs. Scruggs and Kane vs. New Jersey in which cases the license taxes were held "tolls."

We call attention to the following case from California. The City of San Mateo had a right to license delivery wagons under Sec. 11 of Article XI, but such use of the streets of a city by delivery wagons of a business enterprise, as would be merely occasional and incidental to a business conducted elsewhere than within its boundaries, would not be the proper subject of taxation.

> "While the use of the streets may be regulated, the city has no power to convert them into toll roads and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways."
>
> *The Emporium vs. San Mateo,* 177 Cal. 622; *City of Madera vs. Black,* 181 Cal. 306.

We have called attention to the appellee by the complaint that the California Courts had interpreted the *Motor Fuel Act* of 1923 (R. 6), and said motor fuel acts are construed together in order to raise revenue in

the nature of compensation for the damage done to the highways by said motor cars, etc. (R. 6, 7.) We again called attention in our original brief and the appellee has not debated the questions in issue.

The Supreme Court of California has interpreted the Motor Fuel Acts and the Motor Vehicle Act, as being one law. (Our original brief, pages 12, 13, 14, 15.) We have answered the statement in such respect in our reply brief.

This Court is bound by such interpretation of these state laws, and it

> "must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."
>
> *Hanover F. Ins. Co. vs. Carr,* cited in our original brief, pages 16, 17 and in our reply brief.

It follows that this Court is only interested in the California laws, as interpreted by the Supreme Court of California. The following cases were cited by appellee:

Cunningham vs. Potts, Motor Liquid Fuel Tax of Washington. In the opinion, one judge, we find in appellee's brief on page 24, the following excerpt:

> "If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon federal highways, a different question would be presented."

In the instant case it is alleged and admitted by the motion to dismiss that

> "All the highways of the State of California are post roads, and the public highways of said State are covered by the said Acts, as aforesaid." (R. 3, 4.)

This case does not furnish much support of the statements of appellee.

Anthony vs. Kozer, Motor Fuel Tax of Oregon. The Oregon law is not similar to the California Motor Fuel Act. Further the Supreme Court of Oregon had interpreted said law and the District Court, one judge followed said decision.

The case was *Portland v. Kozer,* 108 Ore. 375, and excerpts from the opinion are found in the opinion of the District Court, but the appellee did not care to include any excerpt of such matter.

We set out the following from the opinion:

> "Defendant's theory is that the 'license tax' is an excise levied upon the dealers for the privilege of engaging in the business of selling and distributing motor fuel to owners and operators of motor vehicles, and is not, in legal sense, a toll imposed for the use of or privilege of using the rural post roads of the state.
>
> "The Supreme Court of the State has heretofore, in the case of Portland v. Kozer, et al., 108 Ore. 375, in a measure passed upon the question involved. This was a suit by the City of Portland to enjoin Kozer, the Secretary of State, from exacting the payment of the license tax from the City of Portland—in other words, privileged to buy its motor fuel from the dealers without being burdened with the license tax imposed upon them. The court was of the opinion that the statute in question did not provide for levying the tax upon the municipalities of the state, but against the seller or dealer prior to purchase of gasoline by the city, and therefore refused to relieve the city from the payment of such tax * * *.
>
> "The result of the decision was that the tax was against the dealer, and that the municipality was not exempt from paying the dealer's charges for

> motor vehicle fuel, although the price might have been so adjusted as to include or absorb the tax."

We now set out the following from the opinion of said Supreme Court:

> "We conclude that the statutes in question do not provide for levying the tax upon the municipalities of the state, but against the seller or dealer prior to the purchase of gasoline made by the city." (108 Ore. 385.)

In the instant case it is alleged in the complaint and admitted by the motion to dismiss that the appellants have paid in advance and must pay in advance before operating on Federal highways, and said exactions are not a part of the price of said fuel but are in addition to the purchase price, etc. (R. 7, 8).

Also the decision in *Old Homestead Bakery v. Marsh* which decided the owners or operators must pay said exactions and not the sellers or distributors.

Again the appellee has failed to support his statement in his brief.

Martine v. Kozer (Appellee's brief, page 27.) A License Motor Vehicle Law of Oregon. This case was based upon the police power of the state, and not for revenue.

Again the appellee has failed.

In the instant case the decisions of California cited by us show that not only the license fees, but also the gas exactions are revenue measures.

Smallwood v. Jeter. (Appellee's brief, page 28.) This action was an attack against the 5% law of Idaho compelling certain operators to pay for the privilege of doing business on the highways, and not a weight measure.

Sanger v. Lukens (Appellee's brief, page 28.) This action was similar to the Smallwood v. Jeter. One judge.

In both cases the courts held that the prohibition against tolls in the Federal Aid Legislation did not protect the plaintiffs.

In the instant case there is no issue of such kind, we are not endeavoring to use the public highways for business purposes, and the Motor Fuel Acts do not charge for business purposes.

Again the appellee has failed.

Liberty Highway Co. v. Michigan Public Utilities Commission. (Appellee's brief, page 28.) The Court issued an injunction against the Commission. One minor question was the charge of a small fee which was to be used for the cost of regulation under the police power; nothing about license fees at all.

The excerpt shows (pages 28, 29) that fact.

Again the appellee has failed.

State v. Oligney. (Appellee's brief, page 29.) A non-resident attacked the license law of Minnesota, in order to operate a truck for business purposes. Under the police power the Court held the license law was not in violation of the Federal Aid Legislation. The excerpt (page 29) shows that fact.

In the instant case the appellee will collect $32,000,000 this year at the cost of a few thousands from these motor fuel laws. Can any court hold that this is a reasonable charge, in addition to about $10,000,000 from the Motor Vehicle Law?

Again the appellee has failed.

Morris v. Duby. (Appellee's brief, page 29.) Again the decision was based entirely upon the police power

and was not based upon the provisions of "free from tolls of all kinds."

Again the appellee failed.

The appellee has set out on page 32 a purported Act of Congress. We will correct the same.

> "An Act to permit the granting of Federal aid in respect of certain roads and bridges.
>
> "Be it enacted by the Senate and House of Representatives, etc., That notwithstanding any provision of the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, or of the Federal Highway Act, the Secretary of Agriculture may extend, on the same basis and in the same manner as in the construction of any free bridge, Federal aid under such acts, in the construction of any toll bridge and approaches thereto." (The balance of appellee's excerpt.)

The appellee says "Suggestive that the intention of congress is as federal and state courts have declared it." Congress has declared that it will waive the provision "free from tolls of all kinds," but does not permit the state or any political subdivision to make any profit. Compare *U. S. v. Michigan,* 190 U. S. 379, cited in our original brief, page 38.

IV.

"The Federal Government Has Acquiesced in the Action of California and Other States." (Appellee's Brief, page 33.)

The appellee does not cite any decision to support the statements under this caption.

The same plea was made in the *Buck v. Kuykendall,* 276 U. S. 205, 69 L. Ed. 623, by the appellee.

The facts show that the Federal Government was protected by Section 10 of both the laws of 1923 and 1927, in which is found the following:

> "nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of government." (See appendix of appellee's brief, page 55, and pages 61, 62.)

It follows of course the government is not raising any objection. When the state enacted the Law of 1923, it enacted the *Motor Vehicle Act* of 1923 the (d) of Sec. 77, which provided that if the Motor Fuel Act was held unconstitutional, then the registration fees of motor vehicles were increased. (See appendix in our original brief, pages 10, 11.)

The appellants show that the appellee had collected many millions during the period from March 31, 1928, to July 1, 1928, at the rate of about $90,000 a day from these appellants, and that the appellee will continue to collect said exactions unless restrained, and the appellants have and will obstruct, hinder, impair and impede the unrestricted and vested passage, use and operation of said motor vehicle owners, etc. (R. 8.)

In 1923 the first Motor Fuel Act was passed, charging the owners or operators the 2-cent per gallon. In November, 1926, the people of the state defeated the attempt to increase (see our original brief, page 39), the exactions to 3 cents. Yet the legislature in 1927 in the face of such vote of the people, passed the law of 1927. For the year 1928 the state has received $32,000,000 from these exactions and at least $10,000,000 from registration fees and licenses (pp. 39, 40). No wonder the appellants and thousands of others have made up their

minds to stop such illegal practices. Prior to the adoption of the Federal Aid Legislation by the state, the public had no recourse to combat such exactions. As was said by this Court, "If the state laws furnish no remedy (in other words, if the charges are sanctioned by them), then, as before stated, it is for Congress, and not the United States Courts to regulate the matter, and provide a proper remedy." (Our original brief, pages 36, 37, 38, 39). Congress did provide a proper remedy and it is the duty of this Court to enforce said remedy under the Acts of Congress.

In the early days many states entered into the construction of works of improvements, canals, highways, railroads, banks, etc. Many of such states became bankrupted and repudiations were made. We call attention to a decision delivered by Judge Moore, in the case of *Oren ex rel. Barbour v. Pingree,* 120 Mich. 550, reciting such situation. The states have gone wild over the construction of highways with no safety valve, except such prohibition. The state is trustee for the public, as well as the Federal Government, and such public, to-wit, these appellants and many thousands of persons, demand relief.

This case is not instituted by "those persons and companies who operate vehicles over the highways for their personal gain." (Appellee's brief, p. 35). Just before this statement the appellee, page 34, cited section 15, article XIII of the Constitution showing that said class must pay a 4½ or 5% of their gross revenue. The appellee is always shifting his position.

On the same page 34, he cites the two cases based upon the Motor Vehicle Law of 1913, to-wit:

In the matter of Schuler, 167 Cal. 259, and

In the matter of Stork, 167 Cal. 294, that "the Supreme Court of California to impose an excise or privilege tax for the purpose of providing a fund for roads under the dominion of the state authorities in the nature of compensation for damage done to the roads by motor vehicles." In other words a "toll" and we had cited the Schuler case for the same purpose. We see no reason why he objects to the interpretation of the Motor Fuel Acts. Both laws constitute one law.

V.

"Appellants Have No Standing in Court." (Appellee's Brief, page 36.)

The appellee cites no decision to statements under such caption.

Because no one except the Federal Government and the State of California can object. Look on pages 32-41 in our original brief. The appellee cited the *Buck v. Kuykendall,* supra. Buck brought the action and not the United States; also the Cunningham case, the plaintiff's brought the action, and not the United States; also the cases of Martine, and Anthony, not the United States. Where did the Government get the money to pay said federal aid? Why, of course, from the appellants and other taxpayers all over the United States. Surely they have the right to enjoy the benefits of their own money, which was paid out for them by the Federal Government.

> "The questions before us are of high importance to the community, and are emphatically questions between the rights of the public and the powers of the corporation. The privilege of making this canal and of receiving tolls upon it, was granted by the

States without any compensation to the public but the convenience it was expected to afford. The States, as well as the United States, have contributed to the expense of its construction. And the court is called upon to decide whether the States who chartered this company have authorized it to enact any amount of toll it may think proper from their own citizens, as well as others, for the privilege of passing over it; or may, if such be its interest or policy, refuse altogether the permission to pass.

"In the opinion of the court the charters do not confer either of these powers upon the corporation, and we shall certify accordingly to the Circuit Court."

Perrine v. Chesapeake & Del. Canal Co., 9 How. 172, 13 L. Ed. 92.

This case was instituted under Section 24 the *Judicial Code*, especially under the Fourteenth clause, to-wit:

"Fourteenth—of all suits of law or equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity, secured by the Constitution of the United States, or any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

VI.

"The State Law Is Consistent With the Fourteenth Amendment." (Appellee's Brief, page 37.)

The appellee cites the four cases brought by the distributors, not the consumers, the *Cunningham* case and *Sanger v. Lukens.* Our position was presented in our original brief, pages 25-32.

The appellee did not notice the reasons of why the 14th Amendment protects the appellants, but on page

42 of his brief we find that he fears that the refunds, etc., will be held illegal. Why, because they offend the 14th Amendment, as well as the California Constitution.

An excerpt from the Supreme Court's decision of the Gas Law of Illinois, *Chicago Motor Club v. Kinney,* cited in our original brief on that question on page 31:

> "We come now to the consideration of the validity of section 10 of the Motor Fuel Tax Act, which is challenged on the ground that it makes a gift of public funds to 'any person who uses motor fuel (upon which the license tax imposed by this act has been paid) for any purpose other than operating a motor vehicle upon the public highways of the state.' It is elementary that taxes can be levied for purposes only (1 Cooley on Taxation (4th Ed.) Sec. 174; Citizen's Savings & Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. ed. 455; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39), and that public funds can not be appropriated to any private purpose (Washingtonian Home v. City of Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798; Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568). It is a violation of the due process of law clause of the national and state Constitutions to take a citizen's money from him under the guise of taxes for any other than a public purpose. Robbins v. Kadyk, 312 Ill. 290, 143 N. E. 863; Green v. Frazier, 253 U. S. 233, 4 S. Ct. 499, 64 L. ed. 878; Water Co. v. Wade, 59 N. J. Law, 78, 35 A. 4."

VII.

"The State Law Is Consistent With the State Constitution." (Appellee's Brief, page 37.)

In our original brief we debated the said refund, etc., as being in violation of the Fourteenth Amendment, from pages 25-32, and also being in violation of the Constitution of California, from pages 41-44. The only defense

is that all of the questioned provisions could be eliminated without nullifying the law in its entirety. Again the appellee did not cite any authority on such matter. We submit that the interpretation of the Courts in the Old Homestead Bakery Case, supra, that the sole purpose was to raise a fund from the owners or operators using their motor cars and not to raise a fund from all the consumers of motor fuel, then, if said refund is held illegal and all consumers must pay, the entire purpose has been destroyed.

In addition to the decisions in our original brief we submit the following:

> "It is well established that a statute may be in part constitutional, and in part unconstitutional, and, if the parts are wholly independent of each other, that which is unconstitutional will be rejected; but as well said in Poindexter v. Greenhow, 114 U. S. 305:
>
> > 'These are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact.' "

The same court also said in *Spraigue v. Thompson,* 118 U. S. 94, where it was sought to apply the rule to certain illegal exceptions in a statute of the state of Georgia:

> "The inseparable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It forces upon the statute a positive operation beyond

the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions." See also, Colleys Constitutional Limitations, 209-12; Warren v. Charlestown, 2 Gay, 84.)

In re Wong Haue, 108 Cal. 680, 683.

To the same effect:

Robert v. Police Court, 148 Cal. 131.

"In other words, the situation is simply that the Legislature has not passed a general law which will operate uniformly, as it was required by the Constitution to do. For the courts to eliminate the exception and thus make the statute operate uniformly would be to hold that Legislature had passed a statute which it had not in fact passed and would, in effect, be for the courts themselves to legislate. To put it concretely, for the courts to strike out from the California Irrigation Act the exception of the counties of Los Angeles and San Bernardino, for that is what the exception really is, would be for the courts themselves to extend the operation of the act to those counties, although the Legislature has expressly said that they shall not come within its operation. Upon this point the present case comes directly within the authority of Spraigue v. Thompson, 118 U. S. 90, (30 L. ed. 115, 6 Sup. Ct. Rep. 988, see also, Rose's U. S. Notes.)"

Mordecai v. Board of Supervisors, 183 Cal. 434, 443.

To the same effect:

"Notwithstanding the provisions of Grain Future Trading Act, Aug. 24, 1921, Sec. 11, that if any provision therein is unconstitutional, the remainder of the act shall not be effected thereby, the invalid tax imposed by Section 4, of the act is so interwoven with act contained in Sections 5 and 6, that they cannot be separated without restraining the act, which is legislative work beyond the power and function of the court, so that such interwoven regulating

sections are invalid, though there are other sections, etc., which may be saved by Section 11."

Hill v. Wallace, 259 U. S. 44, 66 L. ed. 839.

To the same effect:

Meyer v. Wells, Fargo & Co., 223 U. S. 298, 56 L. Ed. 445.

The Illinois Court in its opinion said in the *Chicago Motor Club,* supra:

"Such an act is not the act that was passed by the General Assembly, and it is not evident that the act would not have been passed without Sections 6 and 10. Where the different objects of an act are so dependent upon or so mutually connected with each other in meaning or as conditions, considerations, or compensations for each other that it can not be presumed the Legislature would have enacted the provisions designed to secure one of the objects without the provisions of the other, the invalidity of the latter renders the whole act void. People v. Martin, 178 Ill. 611, 53 N. E. 309; Springfield Gas & Electric Co. v. City of Springfield, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679; Cooley on Const. Sim. (7th ed.) p. 246."

VIII.

"Injunction Relief Should Be Denied." (Appellee's Brief, page 45.)

The appellee cited no authority for the statements under this caption.

We refer to our original brief, and will set out an excerpt from one of the cases cited by us:

"It was charged that such action was a denial to the railroad companies of the equal protection of the laws, in violation of the Fourteenth Amendment.

The complainants asserted their right to relief in equity by injunction, because if the executive council certified their assessments, and distributed them to all the counties through which the railways ran, it would entail on the companies a multiplicity of suits to vindicate their constitutional rights. Complainant moved for temporary injunction under Section 266, of the Judicial Code. The Court, consisting of a circuit judge and two district judges, on the evidence adduced, found that it did not disclose intentional discrimination by the state taxing tribunals, and denied the motion. * * *

"Jurisdiction in the Rock Island case depends on the averment that the attempted assessment of complainant's railroad property in Iowa, complained of, was at a rate and upon a basis greater than the assessment of other property of the same class subjected to taxation in Iowa, and that the suit arises under the Fourteenth Amendment to the Federal Constitution forbidding any state to deprive any person of his property without due process of law, or to deny him the equal protection of the laws. We think this averment, in view of the allegations of the bill, invoked a substantial controversy under the Federal Constitution, and gave the district court jurisdiction. Its jurisdiction thus established gave the district court the authority to determine all questions involved, including questions of state law, irrespective of the disposition of the Federal question; and as the relief to which the complainant might be entitled would be the same as that which should be allowed him by the Federal Court upon a construction of the state Constitution and laws such as he contends for, the question whether the acts complained of violated the Federal Constitution need not be decided." (Citations.) "It follows, therefore, that in both the cases under consideration, the district court has jurisdiction to consider and decide whether the complainants in these cases are so injured by a violation of the State Constitution and laws in the taxation of their property as to entitle them to the

equitable remedy of injunction against the taxing officials made defendants."

Chicago Great Western R. Co. v. Kendall, 266 U. S. 96, 97, 69 L. ed. 188, 189.

In Conclusion.

We submit that the exactions are "tolls", being charges for the privilege of using the improved highways by motor cars by the owners and operators; all highways outside the limits of municipalities are constructed or reconstructed by Federal aid; all of the money collected is expended on the Federal aided highways; 40 per cent of the money is collected from the use of Federal aided highways, the balance, 60%, is collected from the use of the streets within the limits of the municipalities; said 40% is collected in violation of the Federal Aid Legislation; the 60% is collected illegally, being exacted for the use of said streets, and no portion of said 60% is expended in the maintenance or repair of said streets, but all of said 60% is expended on the said Federal aided highways, and the owners and operators pay a "toll" without any benefit, as all of said streets are constructed or reconstructed and maintained and repaired at the cost of the taxpayers of said cities, including the owners and operators; all of said 100% is collected illegally by reason of the provisions of said laws granting refunds, one per cent for future loss and handling, and the retention of all moneys collected by the distributors for 45 days; said laws and the acts of the appellee enforcing the same are illegal and unconstitutional, being contrary to and in violation of the Federal Aid Legislation of the 14th Amendment and the Constitution of the State of California.

The questions presented herein have never been passed upon by this Court where the rights of owners and operators are involved.

Respectfully submitted,

W. R. CRAWFORD,

EDWIN C. EWING,

Solicitors for Appellants.

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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1928

No. 529 12

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS et al.,

Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

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SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	5
THE CALIFORNIA HIGHWAY SYSTEM IN GENERAL	5
THE STATE ACTS OF 1923 AND 1927 DO NOT EXACT A "TOLL" WITHIN THE MEANING OF THE FEDERAL AID AND HIGHWAY ACTS	13
THE FEDERAL AID ACT AND THE FEDERAL HIGHWAY ACT HAVE NOT BEEN VIOLATED	23
THE FEDERAL GOVERNMENT HAS ACQUIESCED IN THE ACTION OF CALIFORNIA AND OTHER STATES	33
APPELLANTS HAVE NO STANDING IN COURT	36
THE STATE LAW IS CONSISTENT WITH THE FOURTEENTH AMENDMENT	37
THE STATE LAW IS CONSISTENT WITH THE STATE CONSTITUTION	37
1. THE REFUND PROVISION	38
2. THE ONE PER CENT PROVISION	40
3. THE FORTY-FIVE DAY PROVISION	41
4. THE PROVISIONS OF THE STATE LAW UNDER ATTACK ARE SEPARABLE	42
5. THE TITLE OF THE STATE LAWS IS SUFFICIENT	43
6. THE DISTRIBUTION OF THE REVENUE UNDER THE STATE LAW	43
INJUNCTIVE RELIEF SHOULD BE DENIED	45
APPENDIX	49
MOTOR VEHICLE FUEL TAX LAWS	49
Sec. 2, Art. XVI, Constitution of California	63
Statutes of California, 1913, page 461	67
Statutes of California, 1919, page 138	71
Statutes of California, 1923, page 123	72
Section 4041 of the Political Code of California	74

CASE INDEX

	Page
Altitude Oil Co. vs. People (Colo.), 202 Pac. 180	22
Amos vs. Gunn (Fla.), 94 So. 615	22
Anthony vs. Kozer, 11 Fed. (2d) 641, 47 S. Ct. 334	24
Askren vs. Continental Oil Co., 252 U. S. 444	20
Bowman vs. Continental Oil Co., 256 U. S. 642	20, 37
Buck vs. Kuykendall, 45 S. Ct. 324 (325)	20
Cal. Juris., Vol. 19, p. 16	11
Cal. Juris., Vol. 29, pp. 363–7	11
Carley & Hamilton vs. Snook, etc., No. 2274-L, In Equity, District Court of U. S., Northern Dis., So. Div.	44
Carson City vs. Red Arrow Garage (Nev.), 225 Pac. 487	22
Clark vs. Titusville, 184 U. S. 329	21
Chicago Motor Club vs. Kinney, 160 N. E. 163	21
Cunningham vs. Potts, 9 Fed. (2d) 469	23, 37
Ellis vs. Stephens, 185 Cal. 720	12
Foster & Creighton Co. vs. Graham (Tenn.), 285 S. W. 570	22
Gafill vs. Bracken (Ind.), 145 N. W. 312	22
Grayburg Oil Co. vs. State (Tex.), 286 S. W. 489	22
Hart Refineries vs. W. E. Harmon, 263 Pac. 687	22, 37
No. 210 U. S. Supreme Court, October Term, 1928	20
Hendrick vs. Maryland, 235 U. S. 610	20
In the Matter of Schuler, 167 Cal. 252	34
In the Matter of Stork, 167 Cal. 294	34
Kane vs. New Jersey, 244 U. S. 160	20
Liberty Highway Co. vs. Michigan Public Utilities Commission, 294 Fed. 703	28
Martine vs. Kozer, 11 Fed. (2d) 645	27
Michigan Public Utilities Commission vs. Duke, 45 S. Ct. 191	20
Morris vs. Duby, 47 S. Ct. 548	29
Montgomery vs. Railway Co., 104 Cal. 186	11
Old Homestead Bakery vs. Marsh, 75 Cal. App. 247	16
Panhandle Oil Co. vs. Mississippi, 48 S. Ct. 451	19
People vs. General Petroleum Corp., 75 C. D. 767	18, 43
People vs. Richfield Oil Co., 75 C. D. 766	18
People vs. Richfield Oil Co., 76 C. D. 45	18
People vs. Sterling Refining Co., 261 Pac. 1080	18, 43
People vs. Ventura Refining Co., 75 C. D. 759	18

CASE INDEX—Continued

	Page
Pierce Oil Corp. vs. Hopkins, 44 S. Ct. 251	19, 37
Pierce Oil Corp. vs. Hopkins, 282 Fed. 253 (255)	21
Portland vs. Kozer (Ore.), 217 Pac. 833	22
Sanger vs. Lukins, 24 Fed. (2d) 226	28, 37
Silver vs. Louisville etc. Co., 213 U. S. 175	37
Smallwood vs. Jeter, 244 Pac. 149	28
Standard Oil Co. vs. Brodie, 239 S. W. 753	37
Standard Oil Co. vs. Jones (S. D.), 205 N. W. 72	22
State vs. Hart (Wash.), 217 Pac. 45	22
State vs. Liberty Oil Co. (Ind.), 97 So. 438	22
State vs. Oligney, 202 N. W. 893 (896)	29
State of Mississippi vs. Panhandle Oil Co., 147 Miss. 663	22
Viquesney vs. Kansas City (Mo.), 266 S. W. 700	22
Western Union Telegraph Co. vs. Hopkins, 160 Cal. 106	11

IN THE

SUPREME COURT

OF THE

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October Term, 1928

No. 529

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS et al.,

Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

This is a proceeding in equity in which the appellants, who allege themselves to be operators of motor vehicles over the public highways in the State of California, seek to enjoin the appellee, as State Controller, from disbursing and causing to be expended revenue collected by the state under the Motor Vehicle Fuel Tax Acts of 1923 and 1927.

The theory of suit is that the said Motor Vehicle Fuel Tax acts violate that provision of the Federal Aid Act of 1916 and the Federal Highway Act of

1921 to the effect that all highways constructed or reconstructed thereunder be free from tolls of all kinds; that the states acts are contrary to the equal protection of the law and the due process of the law clauses of the fourteenth amendment; and that they offend against certain provisions of the constitution of California.

Sitting under section 266 of the Judicial Code, the court below denied injunctive relief and granted a motion to dismiss the bill of complaint. The proceeding comes to this court by direct appeal.

STATEMENT OF THE CASE

In 1923, the legislature of California passed an act regulating and licensing the business of producing, refining or distributing motor vehicle fuel (Stats. 1923, p. 571). As amended (Stats. 1925, p. 659, and Stats. 1927, p. 308) it requires every "distributor," as therein defined, to pay to the state in quarterly installments a license tax for the privilege of engaging in such business, in an amount computed at two cents per gallon of motor vehicle fuel.

That act is fully and accurately set forth in the appendix to this brief. A portion only of that act is appended to appellants' brief, but it is inaccurate in many respects.

In 1927, the legislature of California passed a second act to regulate and license the said business, adding a tax of one cent to the two-cent license tax provided for in the 1923 act. The only essential differ-

ence between the two acts is that the revenue derived from the earlier act is available for construction, reconstruction and maintenance of public highways, while the proceeds of the 1927 tax must be expended exclusively in construction and improvement.

In 1916, congress enacted the Federal Aid Act (39 Stat., p. 355), authorizing the federal government to cooperate with the states in the construction of rural post routes. The act requires the formal assent of the state; declares all public roads to be post routes; defines the term "rural post road" to mean any public road over which the United States mails are transported, excluding every street and road in a place having a population of 2500 or more, except that portion of any such street or road in which t houses average more than 200 feet apart; and provides that all roads constructed under the provisions of that act "shall be free from tolls of all kinds."

The State of California, by legislative act, assented in 1917 to the terms of the Federal Aid Act. (Chap. 29, Stats. of Cal., 1917.)

Further authority for additional appropriations was extended by congress through the enactment of the Federal Highway Act in 1921 (42 Stat. 212). Therein it is expressly provided that federal aid moneys may be expended only in construction and reconstruction of "highways," which are defined to exclude any street in a municipality having a population of 2500 or more, except that portion thereof in which, within a distance of one mile, the houses

average more than 200 feet apart; and it is also stated therein that

> "all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds."

Continuance of cooperative highway work by the federal and state governments, following a departmental reorganization in this state, is provided for in section 365*i* of the Political Code (Stats. of Cal. 1925, p. 386).

Appellants plead that they are operators of motor vehicles on the public highways in this state; that they must pay in advance the taxes imposed by the Motor Vehicle Fuel License Acts of 1923 and 1927 before operating on federal aided highways; and that said taxes are in addition to the purchase price of the fuel with which their vehicles are operated. (Tr. p. 7.)

It is alleged by appellants that the appellee has collected large sums of money under said acts of 1923 and 1927 (Tr. p. 8); and that the federal government has paid to the state large sums of money to be expended in accordance with the federal acts of 1916 and 1921. (Tr. p. 3.)

It is averred that the fuel taxes are "tolls" within the meaning of the Federal Aid and Highway Acts and can not be legally disbursed by the state; that the collections by the state under the licensing acts of 1923 and 1927 are in violation of the fourteenth amendment to the federal constitution; and, also,

that they contravene certain provisions of the constitution of California, to which a detailed reference will hereafter be made. (Tr. p. 9.)

Accordingly, appellants pray that appellee be restrained from disbursing collections under the state acts of 1923 and 1927 and that such moneys be impounded, also that the appellee be permanently restrained from enforcing the provisions of said acts.

The motion of appellee to dismiss the bill of complaint comprehends special grounds of objection as well as a general demurrer, but upon the hearing of the application for an interlocutory injunction the appellee relied only upon his general demurrer, and that only is his basis of resistance upon this appeal.

ARGUMENT

The California Highway System in General.

Section 36, article IV of the constitution of California, adopted in 1902, declares that

> "The legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance in whole or in part of any county highway."

Prior to 1909 there was no definite provision for a state highway system, and theretofore all moneys expended by the state in the construction or maintenance of public highways were paid out of the

general fund of the state by legislative appropriation.

The State Highway Act of 1909 (Chap. 383, Stats. of California for 1909) provided for the first state highway bond issue of $18,000,000 for the acquisition and construction of a system of state highways. That act was adopted by the people at the general election in 1910.

The State Highways Act of 1915 (Chap. 404, Stats. of California for 1915) provided for the second state highway bond issue of $15,000,000 and for certain extensions of the original state highway system. It was approved by the people at the general election in 1916.

Section 2 of article XVI of the constitution of California was adopted at a special state election in 1919 (Chap. 46, Stats. of California for 1919) and provided for a state bond issue of $40,000,000 for the construction of certain additional state highways. (See Appendix.)

California's first Motor Vehicle Act was enacted in 1913 (Chap. 326, Stats. of California of 1913), regulating the use and operation of vehicles upon the "public highways," defined therein to

> "include any highway, county road, state highway, county road, state highway or state road, public street, avenue, alley, park, parkway, driveway, or public place in any county or incorporated city and county, city or town."

Fees and licenses collected thereunder were placed in a "Motor Vehicle Fund." One-half of the col-

lections were returned to the counties from which they were received to be paid into the county road funds (section 36), and the balance remaining after the payment of administrative expenses was set apart for the maintenance of state highways. (Section 39.)

The Motor Vehicle Act of 1913 was replaced by the Motor Vehicle Act of 1915 (Stats. 1915, p. 397). One-half of the collections thereunder was given to the counties in proportion to the number of vehicles registered, to be deposited in the county road funds and to be expended by the counties exclusively in the construction and maintenance of public roads, bridges and culverts in the counties, with power in the county supervisors to expend any portion in the construction, maintenance and repairs of streets, bridges and culverts within incorporated cities. The other half, after payment of administrative expenses, was retained by the state for the maintenance, repair, widening, preservation and reconstruction of state roads under the jurisdiction of the State Highway Department. (Section 159.)

The Motor Vehicle Act of 1915 was replaced by the California Vehicle Act of 1923 (Stats. of 1923, p. 517). Section 21 thereof defines "public highway" to include every highway or road intended to be or used by the general public, including those within municipalities. Collections thereunder are expended in substantially the same manner as in the Motor Vehicle Act of 1915 (section 159). Fines and

forfeitures collected in cities through arrests effected by city officers or employees are placed in a city "street improvement fund" to be used exclusively in the construction, maintenance and improvement of public streets, bridges and culverts within the city. The act of 1923, as amended in 1925 (Chap. 240), and as amended in 1927 (Chaps. 752, 844 and 854), is now in force.

Section 13 of the Motor Vehicle Fuel Tax Act of 1923 provides that one-half of the collections thereunder, after payment of refunds, shall be paid to the counties of the state in the proportion which the number of vehicles registered in each county bears to the total number of such vehicles, and the amount apportioned to the counties shall be expended exclusively "in the construction and maintenance of roads, bridges and culverts in each such county" (section 13). The other half of the collections is paid into the "State Highway Maintenance Fund" and is made available for the maintenance and reconstruction of the state highways.

Moneys collected under the Motor Vehicle Fuel Tax Act of 1927, less one-third of the refunds, are credited to the "State Highway Construction Fund" and are available for the construction and improvement of state roads and highways in accordance with chapter 794 of the Statutes of California for 1927.

In 1923, the legislature of California passed the so-called Motor Vehicle Transportation License Act, under which persons using any public highway in

the state for compensation were subjected to a license tax computed at the rate of four per cent of the gross receipts from operation, less the amount paid by an operator for county or municipal licenses or taxes upon his operative property. All sums collected thereunder were appropriated, one-half to the state for the maintenance and repair of "public highways" and one-half to the counties upon the basis of the number of motor vehicles registered, to be expended exclusively in the maintenance and repair of "public highways" within the county. (Section 8.)

The Motor Vehicle Transportation License Act of 1923 was superseded by the Motor Vehicle Transportation Act of 1925 (Chap. 412, Stats. of 1925). In so far as the provisions noted in the 1923 act were concerned they were repeated in substance in the act of 1925. The act of 1925 was repealed as of January 1, 1928 (Chap. 843, Stats. 1927).

In November, 1926, the people adopted section 15 of article XIII of the constitution of California, by which all persons and companies engaged in the business of transporting persons and property as common carriers for compensation "over any public highway in this state" between fixed termini or over a regular route are subjected to an annual state property tax upon their operative property computed at the rate of 4½ per cent of the gross receipts from operation, in the case of passenger carriers, and at the rate of 5 per cent in the case of freight carriers.

Such taxes are in lieu of all other taxes and licenses, state, county and municipal, on the said operative property. The revenues under that section are appropriated, one-half to the state to be devoted exclusively to the maintenance and repair of "public highways within the state," and the other half to the counties upon the basis of the number of registered motor vehicles to be devoted exclusively to the maintenance and repair of "public highways within such county." That section is in full force and is carried into effect by section 3664*aa* of the Political Code of California.

As noted, the legislature is empowered by the constitution to declare "*any* road a state highway" (Sec. 36, Art IV), which means that any city street may be made a link in the state highway system. By legislative act the state may aid in the construction and maintenance of highways in counties and towns (Stats. 1913, p. 461). Conversely, counties and cities are authorized to perform street work upon the highways under the control of the state (Stats. 1919, p. 138). The state has authorized counties to improve or assist in the improvement of streets lying within municipalities. (Stats. 1923, p. 123; Section 4041 (4) Political Code.) (These statutes are appended hereto.)

"Public highways" are defined by section 2618 of the Political Code of California as follows:

> "In all counties of this state public highways are roads, streets, alleys, lanes, courts, places,

trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property."

The term "public highway," accorded its ordinary and generally accepted meaning, includes so-called city streets.

Section 2618 Political Code of California;
Montgomery vs. *Railway Co.*, 104 Cal. 186;
Western Union Telegraph Co. vs. *Hopkins*, 160 Cal. 106;
Vol. 19, Cal. Juris., p. 16;
Vol. 29, Cal. Juris., p. 363-7.

This general, but not exhaustive, survey of the highway system in this state shows that federal aid for construction and reconstruction of certain highways within the states became available long after the State of California had gone far with its program of not only constructing and reconstructing, but also repairing and maintaining *all* public highways within this state, including so-called state highways, county highways *and city streets*. Millions of dollars had been expended or had become an obligation of the state, in the course of a comprehensive public highway plan, long before the limited federal aid became available.

Long before the enactment of the federal road aid acts there was a network of public highways throughout California, all of which the state and its governmental agencies had constructed and maintained

without federal assistance. Ever since the enactment of the Federal Aid Act of 1916, and long prior thereto, the State of California and its subordinate agencies have constructed and maintained public highways within municipalities of every size, and under the law of the state, as it now stands, the state has the obligation of constructing and maintaining public highways in all municipalities, regardless of their population.

Before the passage of the federal road aid legislation the state and its political subdivisions had the entire burden of maintaining, as well as constructing, all public highways, and the burden of maintenance was not lifted or shared by the federal legislation for, as noted, the contribution of the federal government is for construction and reconstruction exclusively.

Unaided, the state, and its units, must find ways and means for the maintenance of all public highways. Unaided, it must also find ways and means for the construction and reconstruction of all public highways. With limited federal aid it must find ways and means for the construction and reconstruction of those highways upon which federal moneys may be expended.

Federal aid, to the limited extent to which it is available, is in practice given when the Secretary of Agriculture finds that any project approved by him has been constructed or reconstructed in accordance

with the act of Congress, though that official may in his discretion arrange for progress payments.

42 Stat. 215;
Ellis vs. *Stephens,* 185 Cal. 720.

The State Acts of 1923 and 1927 do Not Exact a "Toll" Within the Meaning of the Federal Aid and Highway Acts.

The Motor Vehicle Fuel Tax Act of 1923 is entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate, and other motor vehicle fuels * * *."

The term "motor vehicle" as therein used is defined to include every vehicle operated upon "the highways of this state" which is propelled by the use of motor vehicle fuel. (Section 1.)

A "distributor" is defined in section 1 to include

> "Every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has been imported into this state, shall distribute or sell the same, whether in

such original package or container in which the same was imported or otherwise than in such original package or container."

Every distributor is required to register with the State Board of Equalization (Sec. 2), and every distributor is required (Sec. 3), to

"pay a license tax to the State Controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock in hand or held in storage by him on September 30, 1923."

From the amount found due to the state from the distributor he is allowed to deduct one per cent of the tax "to cover subsequent losses occasioned by evaporation and handling" (Sec. 3). The tax is made a lien upon all of the property of the distributor and attaches at the time of the delivery or dis-

tribution. Within twenty days after the end of each quarter the distributor must report his deliveries or distributions for the quarter; the State Board of Equalization must make up a license tax roll within thirty days from the end of the quarter; the tax shall be paid within thirty-five days after the end of the quarter and if not paid prior thereto becomes delinquent on the forty-fifth day after the end of the quarter and a ten per cent penalty is added for delinquency (Secs. 4 and 6).

If a distributor uses motor vehicle fuel for a nonpublic highway use or for a nonmotor vehicle use he is entitled either to a credit or to a refund to the extent that his license tax was measured by that gallonage. The nonpublic highway and nonmotor vehicle uses are defined in sections 10 and 11.

Anyone who can show that he has bought and used motor vehicle fuel for a nonpublic highway or for a nonmotor vehicle use and who can also show that he has paid any license tax for such fuel, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed the amount of such tax paid by him. This is the so-called refund provision.

Our state courts have not held that said taxes are taxes upon the motor vehicle operator and not upon the person or company engaged as a distributor in the business of manufacturing or selling motor vehicle fuel to be used in propelling motor vehicles upon

the public highways. No occasion has arisen in a state court for a determination of the nature of those taxes.

Nevertheless, appellants insist that the supreme court of California has interpreted the act of 1923 as imposing a license tax for motor vehicles operated over the public highways. They wholly rely, in that regard, upon the case of

Old Homestead Bakery vs. *Marsh*, 75 Cal. App. 247.

That case did not present any issue before this court, nor was the court faced with the problem of determining whether the tax was an occupational excise for the privilege of conducting the business specified in the act of 1923, or whether it was a tax upon the operators of motor vehicles upon the public highways.

The only question there before the court was whether the state law offended against the equal protection clause of the Fourteenth Amendment and against a similar provision in the state constitution in discriminating between electrically-propelled and gasoline-propelled vehicles operating upon the public highways in the matter of the burden of state licenses and taxes. The difference in treatment complained of was justified by the court as reasonable in view of the essential distinction in the types of vehicles (p. 263).

Incidentally, the court stated that the act of 1923 was one

> "requiring, practically, the owners or operators of all such cars (gasoline propelled cars) to pay to the state, in addition to nominal registration fees, two cents per gallon for all gas consumed in the operation thereof. It is true that the license tax of two cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles, yet, that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of two cents on every gallon of gas that they purchase for use in propelling motor vehicles, is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes assessed against the goods and wares of the vendor thereof and by him paid are always included in so called 'overhead expenses,' and, of course, constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer * * *."

That may be said of anyone who has anything to sell and has, therefore, opportunity to pass on his taxes to the buyer, but is far from a declaration that the gasoline tax is a "toll" upon users of the highways.

Indeed, there have been several cases before our state courts upon records disclosing that the two-

cent tax was passed on to the consumer, but in no one of those cases did the court have occasion to determine whether the tax is upon the consumer instead of upon the privilege of conducting the business of selling the thing which the consumer uses.

People vs. *Ventura Refining Co.*, 75 C. D. 759;
People vs. *Richfield Oil Co.*, 75 C. D. 766;
People vs. *Richfield Oil Co.*, 76 C. D. 45.

The only other state appellate court cases in which the statute was involved are

People vs. *General Petroleum Corp.*, 75 C. D. 567, and
People vs. *Sterling Refining Co.*, 54 C. A. D. 777. 261 Pac. 1080.

but they do not bear upon the point now under discussion.

The term "highways" used in the act of 1923 comprehends *all* public highways in the state, including many highways upon which federal aid moneys have not been or can not be expended.

The text of the act of 1923 clearly shows an intention on the part of the legislature to license the business of "distributor." No one but the distributor is required by the act to pay the tax. The state has no control over the distributor after he has paid the tax and if he attempts to or succeeds, in whole or in part, in passing on the tax to someone else, surely it can not fairly be said that the state has taxed the person to whom the tax has been passed on by the distribu-

tor. The only one whom the state makes responsible for the tax is the distributor. The tax is imposed upon him alone, and there is no word in the statute indicating that the state stands behind the distributor in any effort to pass on the tax to the consumer. Unless the state participates in the act of passing on the tax there is no indirect taxation of the consumer by the state.

The tax in question is no more a "toll" than would be an ordinary property tax assessed and levied against an automobile in the hands of the dealer, assuming, as is doubtless the fact, that the amount of the tax is, in effect, passed on to the buyer who uses the automobile over the public highways.

There is no provision in the California constitution denying to the state legislature the power to regulate the business of selling fuel to be used in propelling motor vehicles over the state highways or the power to tax the privilege of carrying on that business. Therefore that power exists.

Pierce Oil Corporation vs. *Hopkins,* 44 S. Ct. 251;

Panhandle Oil Co. vs. *Mississippi,* 48 S. Ct. 451.

There is no vested right to an unrestricted or unregulated use of the public highways. They belong to the state, all will concede; the state may make provision appropriate for securing the safety and convenience of the public in the use of them, and in so doing

"it may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided."

Buck vs. *Kuykendall,* 45 S. Ct. 324 (325);
Kane vs. *New Jersey,* 244 U. S. 160;
Hendrick vs. *Maryland,* 235 U. S 610;
Michigan Public Utilities Commission vs. *Duke,* 45 S. Ct. 191.

A similar New Mexico statute applicable to distributors of gasoline has been held by this court to be an excise tax.

Bowman vs. *Continental Oil Co.,* 256 U. S. 642;
Askren vs. *Continental Oil Co.,* 252 U. S. 444.

On February 18, 1929, this court, in the case of

Hart Refineries vs. *W. E. Harmon,* as Treasurer of the State of Montana, No. 210, October Term, 1928,

declared a Montana statute, similar in terms to the California act of 1923, to levy an excise tax upon distributors and dealers engaged within the state of Montana in the business of refining, manufacturing, producing or compounding gasoline or distillate and selling the same in that state, and also upon those engaged within that state in the business of shipping, transporting or importing gasoline or distillate into that state and selling it there after it has been brought to rest therein.

An Illinois gas tax statute, similar to the Cali-

fornia act except in the matter of the refund provision, has been held to be an occupational tax imposed upon distributors of motor vehicle fuel and a charge on the business of distributing motor vehicle fuel imposed for the purpose of raising revenue for highway construction and maintenance.

Chicago Motor Club vs. *Kinney,* 160 N. E. 163.

An Arkansas statute required all sellers of gasoline for use in motor vehicles to collect a tax of one cent a gallon in addition to the usual charge and pay it over to the county treasurer. The federal court held that the tax was not levied against the purchaser, but was an excise tax on the privilege of making sales of gasoline, even though, as the court said, it is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodity sold which will include the amount of the tax.

Pierce Oil Corporation vs. *Hopkins,* 282 Fed. 253 (255),

citing

Clark vs. *Titusville,* 184 U. S. 329.

On the appeal to this court the Arkansas statute was upheld.

Pierce Oil Corporation vs. *Hopkins, supra.*

A statute similar to the California act of 1923 was enacted by the legislature of Mississippi. It was held by the Supreme Court of that state to be a tax

upon the privilege of engaging in the business of distributing motor vehicle fuel.

State of Mississippi vs. *Panhandle Oil Co.* 147 Miss. 663.

In many other states there is legislation along the lines of the California statute and on every occasion it has found its way into the state courts, it has been pronounced to be a privilege or occupational tax.

Foster & Creighton Co. vs. *Graham* (Tenn.), 285 S. W. 570;
Altitude Oil Co. vs. *People* (Colo.), 202 Pac. 180;
Amos vs. *Gunn* (Fla.), 94 So. 615;
Gafill vs. *Bracken* (Ind.), 145 N. E. 312;
Viquesney vs. *Kansas City* (Mo.), 266 S. W. 700;
Carson City vs. *Red Arrow Garage* (Nev.), 225 Pac. 487;
Portland vs. *Kozer* (Ore.), 217 Pac. 833;
Standard Oil Co. vs. *Jones* (S. D.), 205 N. W. 72;
Grayburg Oil Co. vs. *State* (Tex.), 286 S. W. 489;
State vs. *Hart* (Wash.), 217 Pac. 45;
State vs. *Liberty Oil Co.* (Ind.), 97 So. 438;
Hart Refineries vs. *Harmon* (Mont.), 263 Pac. 687.

An extensive annotation in this regard appears in 47 A. L. R. 980.

The Federal Aid Act and the Federal Highway Act Have Not Been Violated.

The prohibition in the Federal Aid Act of 1916 and in the Federal Highway Act of 1921 against the expenditure of federal moneys in constructing or reconstructing roads which are not free from tolls does not extend to occupational or privilege taxes.

Appellants do not cite a single case which holds, or even intimates, that a state law such as the California Motor Vehicle Fuel License Act of 1923 or 1927 imposes a "toll" contrary to the prohibition in the Federal Aid and Highway Acts.

Every decided case involving this point has sustained state excise taxes against the claim that they run counter to the anti-toll provision, but no one of them is cited in appellants' brief. The first of them is

Cunningham vs. *Potts,* 9 Fed. (2d) 469.

It deals with a statute of the state of Washington providing for a liquid fuel tax on gasoline used in vehicles operated or intended to be operated on public highways of that state. The act was attacked by owners and operators of motor vehicles, represented by counsel for appellants in this proceeding, on the ground it imposed a "toll" forbidden by the federal aid laws, but the court upheld the state law saying:

> "If a tax of two cents a gallon, paid by the seller or distributor of gasoline used in vehicles operated or intended to be operated upon the public highways of the state, is in any sense a toll charged for the use of such public highways, it is not forbidden by section 9, because there are pub-

lic highways of the state for the privilege of using which, by motor vehicles, the state has the undoubted right to exact such tax. If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon federal aid highways, a different question would be presented."

A direct appeal was taken to this court and was dismissed for want of jurisdiction.

47 S. Ct. 334.

While the Washington statute was under attack in *Cunningham* vs. *Potts, supra,* certain owners and operators of motor vehicles within the state of Oregon, also represented by counsel for appellants in this proceeding, sought to enjoin the collection of taxes under an Oregon statute imposing a license tax on dealers selling fuel for motor vehicles traversing the public highways in that state. They contended that the statute violated the anti-toll provision of the federal road acts, but the court refused an injunction and sustained a motion to dismiss. From that decree a direct appeal was taken to this court and was dismissed for want of jurisdiction.

Anthony vs. *Kozer,* 11 Fed. (2d) 641, 47 S. Ct. 334.

In holding that the license tax was not a "toll" within the contemplation of the federal statutes the court said that the use of the revenue for highway

purposes did not lend any support to the argument that the tax was a toll upon the use of the highways by automobile traffic because

> "The state could as well have directed that the money arising from such tax should be turned into the treasury generally, and used for general purposes. If such had been the case, there could not be the remotest inference that the tax was a toll imposed upon the privilege of using the highway for automobile traffic."

Answering the argument that the purchaser of fuel from the dealer was required to pay, as an added expense, the exact amount of the tax, the court said:

> "Nor is it demonstrable that the tax that the dealer is required to pay is an added expense to the purchaser, for his motor fuel, in the exact amount of the tax. It may or may not be, with the probability in favor of the negative. No one can say that the levy of the dealer's excise tax lifts the market price of motor fuel by just that amount, or in any amount, if it comes to that. It may be that the market price of the fuel is controlled by the importers into the state. But that, again, is controlled by competition among oil producers and refiners, and by supply and demand. Of course, local conditions enter more or less into the fixing of market value, one of which may be the imposition of a local excise tax, and it may be that importers, in responding to market prices, really absorb a proportion of the tax; that is to say, the market price to the dealers may be less by reason of the tax than it would otherwise be. So that it can not be said with confidence that

motor oil costs the users more by exactly the amount of the tax than it would cost them if the tax were not imposed, nor that the user pays more by the amount of the excise paid by the dealer for his motor fuel. The amount of the tax is therefore an unreliable standard as a toll against the driver of an automobile for the privilege of operating his car upon the highways."

Analyzing the intention of congress, in its reference to "tolls" in the road acts, the court said

"Further than this, the tax lacks the characteristics of a toll. In its general acceptation, toll is 'a settled, certain, and defined sum exacted for the use of a common passage; a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; * * * a tax paid for some use or privilege or other reasonable consideration; the consideration for the use of a road or bridge, not compensation for carriage over it; a tribute or custom paid for passage; something taken for a liberty or privilege.' 38 Cyc. 359.

"No doubt the congress had in mind, in adopting the clause, 'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds,' the many toll roads of the country that were in years previous constructed through grants of public lands and bounties appropriated by the general government, and on which, for the privilege of passage, the proprietors were permitted to exact tolls, and it was adopted as a policy that no tolls of any kind should be exacted for the privilege of passage over

the rural post roads for the construction of which the government was to appropriate its public funds. Such is obviously the intendment of the acts of congress in extending aid to the states for construction and maintenance of their roads and highways. The excise tax here provided for has no relation to the tolls inhibited by the acts of congress, and is therefore not to be condemned as such."

At the same time the Oregon license tax was in question in *Anthony* vs. *Kozer, supra,* a group of owners and operators of motor vehicles, represented by counsel for appellants in this proceeding, assailed the Motor Vehicle Act of Oregon upon the same ground, but the state's motion to dismiss was granted.

Martine vs. *Kozer,* 11 Fed. (2d) 645.

The federal court referred to *Anthony* vs. *Kozer, supra,* as "an analagous case" and quoted approvingly what was there said with reference to the anti-toll provision, concluding with the statement that the taxes under the Motor Vehicle Act were

"not a toll of any kind within the intendment of the acts of congress cited * * *."

The state of Idaho has a statute imposing a weight tax upon transportation companies using the public highways for compensation. It was urged in the state court that the tax was in violation of the provisions in the federal road acts forbidding tolls, but the state court held that the tax was consistent with

those provisions because it was a license tax laid not upon the vehicle but upon the privilege of using the highways for business purposes.

Smallwood vs. *Jeter,* 244 Pas. 149.

The Idaho statute, the subject of controversy in *Smallwood* vs. *Jeter, supra,* was taken before the federal court in an injunction suit in the case of

Sanger vs. *Lukens,* 24 Fed. (2d) 226.

One of the questions, in the language of the court, was whether the declarations in the acts of congress authorizing the cooperative work on public highways against the exaction of tolls "deprived the state of the power of enforcing regulations in the use thereof." The motion to dismiss was sustained, the court adopting the view expressed in the Anthony, Martine and Smallwood cases.

An act of the state of Michigan imposing privilege taxes upon common carriers of persons and property by motor vehicles on the public highways was alleged to be contrary to the anti-toll provision in the Federal Highway Act of 1921 in the case of

Liberty Highway Co. vs. *Michigan Public Utilities Commission,* 294 Fed. 703 (708),

but the court ruled otherwise, saying of that provision:

> "This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analagous fees imposed under general motor

vehicle license laws, or to laws licensing drivers of such vehicles). *State* vs. *Vigneaux,* 130 La. 424, 58 South. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the federal government and the state, to the contribution of aid provided by federal legislation, and can not deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state, to enact reasonable regulations in the exercise of its police power over such highways."

The Motor Vehicle Act of Minnesota was asserted to be invalid to the extent that it applied to vehicles using federal aid highways, because of the anti-toll provision. The point seems to have been predicated upon the decisions of this court in *Buck* vs. *Kuykendall* and *Michigan Public Utilities Commission* vs. *Duke, supra,* but of them the state court said:

> "We find nothing in these cases which would prevent a state from enacting a statute imposing a reasonable tax upon motor vehicles using public highways constructed with federal aid."
>
> *State* vs. *Oligney,* 202 N. W. 893, (896).

An Oregon statute regulating the use of the highways by motor trucks of over five tons capacity was before this court to have determined whether it was contrary to the letter and spirit of the Federal Highway Act.

Morris vs. *Duby,* 47 S. Ct. 548.

Referring to that act of congress this court held that it disclosed no provision, express or implied, by which there was withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. It was also said:

> "Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on the state."

Although all of the cases cited under this head sustain the right of a state to enact and enforce so-called gasoline taxes consistently with the federal aid acts, only one of them, *Anthony* vs. *Kozer, supra,* undertakes an analysis of what congress intended in declaring that highways receiving federal aid shall be free of tolls. In that case the court reasons that the term "toll", in its general acceptation, is a definite sum exacted for the use of a common passage.

The tax imposed by the California statutes is not a definite sum exacted for the use of a common passage. It is not a direct charge upon those who use the common highways of the state, and if distributors

of motor vehicle fuel do succeed in passing on the tax to those who use the roads, those thus affected are only operators of motor vehicles. Even they may use the common highways of the state without any indirect burden if they choose to traverse the highways otherwise than by motor vehicle.

A "toll" in the true sense would be a charge to all who travel over a highway, regardless of the means by which they proceed. In writing into the federal law the prohibition against tolls, congress apparently did so in contemplation of charges exacted for the privilege of passing over the privately owned roads used by the public and subsidized roads of quasi-public character. Those who insist upon traversing the common highways in a particular manner, namely, by motor vehicle, are essentially in the same category as those who earn their livelihood by using the common highways in carrying on their business. There being no vested right to an unrestricted use of public highways, and power existing in the states to impose direct taxes upon everyone using the highways regardless of the purpose or character of use, particularly upon those who employ an instrumentality highly destructive to the road bed and a source of danger to others, it would seem to follow that congress recognized the existence of that power and has not attempted to deny its exercise in the federal aid legislation.

Suggestive that the intention of congress is as federal and state courts have declared it, is the

amendment made by congress in 1927 to the Federal Highway Act of 1921,

C. 370, 44 Stat. 1398, reading as follows:

"Notwithstanding any provision of this title, the Secretary of Agriculture may extend, on the same basis and in the same manner as in the construction of any toll bridge, federal aid under such title, in the construction of any toll bridge and approaches thereto, by any state or states, or political subdivision or subdivisions thereof, upon the condition that such bridge is owned and operated by such state or states, or political subdivision or subdivisions thereof, and that all tolls received from the operation thereof, less the actual cost of operation and maintenance, are applied to the repayment to the state or states, or political subdivision or subdivisions thereof, of its or their part of the cost of construction of such bridge, and upon the further condition that when the amount contributed by such state or states, or political subdivision or subdivisions thereof, in the construction of such bridge shall have been repaid from the tolls, the collection of tolls for the use of such bridge shall thereafter cease, and the same shall be maintained and operated as a free bridge."

Assuming, for the moment, that the taxes in question are "tolls" within the prohibition of the federal statutes, no question of constitutionality is presented. At most, there would be, in such event, a breach of contract on the part of the state and a mistake on the part of the federal government. Not even under

those circumstances would appellants be entitled to have state officials enjoined from collecting and expending the taxes collected under the state law, and appellants do not put forward any decision or reasoning of contrary persuasion.

The Federal Government Has Acquiesced in the Action of California and Other States.

The federal government has not attempted to carry out a policy of independent construction and maintenance of public highways needed for national purposes, and much might be said against such a course. Presumably, congress has always been fully conscious of its obligation to provide, or cause to be provided, public roads for the transportation of the mails, troops and munitions of war and for the facilitation of interstate commerce.

Since 1923 the state has been enforcing the two-cent tax act without any complaint on the part of the federal government, and during the five-year period congress has been, and still is, according to the allegations of the complaint, appropriating large sums to the state under the authorization of the federal aid acts.

When the Federal Aid Act was passed in 1916 the Motor Vehicle Act of 1915, which followed substantially the Motor Vehicle Act of 1913, was in operation in California, and under those statutes registration fees and licenses were imposed upon motor vehicles using the public highways. The

Motor Vehicle Ast has been held by the Supreme Court of California to impose an excise or privilege tax for the purpose of providing a fund for roads under the dominion of the state authorities in the nature of compensation for damage done to the roads by motor vehicles.

In the Matter of Schuler, 167 Cal. 252;
In the Matter of Stork, 167 Cal. 294.

Ever since 1913 there has been in force in this state a Motor Vehicle Act, and no complaint has ever been made by the federal government that the charges thereby *directly* imposed for the operation of motor vehicles over the public highways constitute a violation of the anti-toll provision of the federal acts.

From 1923 to 1928 there was in full force in this state a Motor Vehicle Transportation License Act requiring operators for hire upon the public highways to pay a license fee to the state, but the federal government has never asserted that the imposition was contrary to the acts of congress.

Since the first Monday in March, 1927, the property tax imposed by section 15, article XIII of the constitution of California upon certain common carriers engaged in business over the public highways has been in force, but notwithstanding that law, and all of the others to which reference has been made, federal aid moneys have been paid to the state.

Under section 11, article XI of the constitution of California, any county, city or town may make and enforce within its limits all such local regulations as

are not in conflict with general laws, and under that authorization local licensing ordinances have been adopted applicable to those who use the highways for profit.

Inaction on the part of the federal government presumes acquiescence in what the State of California, and other states, have been and are doing in the matter of taxation, so far as the federal aid highways are concerned, and may fairly be attributed to a recognition of the fact that the states must find moneys with which to construct and maintain highways receiving federal aid, to construct highways which will receive no federal aid, to maintain all of the public highways, including those into which federal moneys have been placed, and that, in doing so, the state may justly take into consideration those types of vehicles which cause the highways the greatest wear and damage and those persons and companies who operate vehicles over the highways for their personal gain.

Surely the federal government did not contemplate the expenditure of millions of dollars from the national treasury for the construction and reconstruction of state roads which would deteriorate into disuse or nonusability, thus defeating congress in accomplishing various national purposes, if the states were cut off, as appellants contend they are, from the right to enact reasonable measures for the production of revenue with which those highways may be maintained and extended.

Appellants Have No Standing in Court.

Again assuming the soundness of appellants' primary contention that the tax in question constitutes a toll of the kind prohibited by the federal acts, appellants have failed to demonstrate how *they* are entitled to be heard in that connection.

The federal acts find their authority in section 8, article I of the federal constitution, by which the states have delegated to congress power to "establish post offices and post roads," and power to make all laws necessary and proper to carry that power into effect. No one of the several claimants is a party to the alleged contract between the federal government and the state. If that contract has been breached by the state, the federal government alone may complain. The alleged breach of contract by the state of itself presents no question of unconstitutionality.

Appellants have cited a number of cases (p. 32 to 41) where states breached definite contracts with the federal government for the transportation of troops, and mail and other government property. In those instances, of course, relief was extended to the federal government, but none of those cases lends support to the position assumed here by the appellants.

It is alleged that the appellants are taxpayers and that they own personal and real property in this state, but it does not appear how that allegation has any significance or how it establishes an interest on

their part sufficient to entitle them to the relief sought.

They claim that they are operators of motor vehicles over the public highways of this state, that they have paid the gasoline taxes, and that they will continue to pay, unless the appellee is restrained, taxes under the acts of 1923 and 1927. The amount which they have thus paid is not alleged, nor is it alleged that the state will be unable to reimburse them from its general fund if the appellee is permitted to continue apportioning the revenue derived from the 1923 and 1927 acts pursuant to the terms of those statutes.

The State Law Is Consistent With the Fourteenth Amendment

The claim that the fourteenth amendment is offended by the California Statutes has often been made against similar laws of other states, but has not been regarded seriously by the courts. Uniformly it has been held that they meet the test of the fourteenth amendment.

Hart Refineries vs. *Harmon, supra;*
Pierce Oil Corp. vs. *Hopkins, supra;*
Bowman vs. *Continental Oil Co., supra;*
Cunningham vs. *Potts, supra;*
Sanger vs. *Lukens, supra;*
Standard Oil Co. vs. *Brodie,* 239 S. W. 753.

The State Law Is Consistent With the State Constitution.

In view of the overwhelming array of authority against appellants' contention that this proceeding

involves federal questions, there seems justification for appellee to reply that merely colorable and not substantial federal questions are raised, and that no duty arises to consider the state questions.

Silver vs. *Louisville etc. Co.*, 213 U. S. 175.

1. The Refund Provision.

Five points are made under the California constitution. First it is claimed that the refund provision (Sec. 11) violates the inhibition against gifts of public moneys.

In the case of *Chicago Motor Club* vs. *Kinney, supra,* it was held that the refund provision in the Illinois gas tax statute violates the prohibition of the Illinois constitution against a gift of public moneys because the refund was made available to a person other than the distributor without regard to whether that person had directly or indirectly paid the tax. The Illinois court expressly refers to the California law and distinguishes the latter by reason of the fact that no refund is permitted under the California law unless the applicant can show that he has directly or indirectly paid the tax.

The refund provision in section 11 of the California statute in express terms requires such a showing by the applicant. That, of course, is merely a recognition by the state that a distributor may under certain circumstances pass on the tax to the consumer, but it certainly is not a direction, or even a suggestion, that he do so. The consumer has in fact

had the tax passed on to him and he can clearly show to the satisfaction of the state that such is the case *and also* that the fuel which he purchased was employed in a nonpublic highway or in a nonmotor vehicle use, then he is entitled to a refund, for under those circumstances it would be his money and not the distributor's money that would have been paid to the state.

The state wisely puts the burden on the distributor to pay a tax measured by the amount of all fuel sold and delivered by him and it collects the tax conditionally, with the right outstanding in the distributor or in the consumer, as the case may be, to show, if he can, that gallonage considered in the computation of the state tax has been used otherwise than in propelling motor vehicles over the public highways of the state.

The California constitution prohibits a gift of public moneys, but it does not prohibit the collection of moneys and their placement in a special fund subject to the condition that the whole or a portion thereof may be paid out by a showing such as that specified in section 11 of the act of 1923. The Illinois case is the only authority cited by appellants in support of their claim that the refund provision violates the gift prohibition.

This point has not been raised in or decided by the California courts.

2. The One Per Cent Provision.

The provision in section 3 of the act of 1923 permitting the distributor to deduct from the tax computed by the State Board of Equalization, one per cent thereof "to cover subsequent losses occasioned by evaporation and handling" is claimed to be unconstitutional, but no argument is advanced in support of the claim.

By analogy, the California statute is an occupational or privilege tax and not a tax upon the user of the highways. The state reaches out for the money of the distributor and it is his money which the state takes. The state requires the distributor to pay a tax measured by his sales of motor vehicle fuel, less one per cent of the amount so computed which is intended as an allowance for losses occasioned by evaporation and handling.

It was within the legislative discretion to have charged a less amount in the first instance, or to permit a deduction, as it has done, on account of such losses occurring subsequent to the filing of the distributor's report with the state. In other words, the amount of the obligation of the distributor to the state is not established until the deduction is made and the obligation of the distributor does not attach until the final computation.

The situation in this regard is much the same as that presented in the Motor Vehicle Transportation License Acts of 1923 and 1925, above referred to, wherein the operator was entitled, as an element in

the process of computing the state tax, to a credit or off-set for the aggregate amount of taxes paid to subordinate governmental agencies of the state. This point has not been made or determined in any state court.

3. The Forty-five Day Provision.

It is also asserted that the provision in the statute permitting the distributor to withhold the amount of the tax for forty-five days after the expiration of the quarterly period is unconstitutional, but again no argument or authority is cited in support of the assertion. The obvious answer to this point is that it is within the discretion of the state to prescribe when a tax is payable and when the delinquency penalty shall attach. A state may permit the distributor to withhold payment of the tax for any period prescribed by the state, if it is the distributor's money that is being paid, or it may make the distributor, as is done under the Arkansas statute, a collector of a tax which is passed on to and paid by the consumer. The California statute imposes a tax upon the distributor and it is his money that the state requires to be paid in as soon as the tax roll for each quarter has been made up and a reasonable time allowed the distributor to pay.

It is quite generally argued that a public utility passes on its taxes to its consumers, but if that is a fact it is not the consumer's money that the state requires to be paid when the tax is levied directly

upon the utility or upon its property. Under section 14, article XIII of the constitution of California the state tax imposed on certain utilities becomes due on the first Monday in July of each year, but the utility is given about six weeks within which to pay without suffering a delinquency penalty, and further it is allowed to pay the tax in two installments, and to delay the payment of the second installment until February following the due date. That is purely a matter of legislative discretion.

4. The Provisions of the State Law Under Attack Are Separable.

Assuming the invalidity of all of the questioned provisions of the state law, each and all of them is separable and may be eliminated from the statute without nullifying the law in its entirety.

It can not be said that any one is inseparably related to the remainder of the act or so indispensable as to render the remainder of the act inoperative. The intention of the legislature that the remainder of the statute be given operation should any provision be unconstitutional but separable is expressed in section 15 of the act.

The last word of the Supreme Court of California on the rule of severability was uttered in cases which found their way to this court, and it is plain therefrom that the state law will stand in the event that the refund provision, or the one per cent provision or the forty-five day provision, is adjudged invalid.

5. The Title of the State Laws Is Sufficient.

Section 24, article IV of the constitution of California requires that the subject of an act be expressed in its title. Twice the act of 1923 here under consideration has been attacked on the ground that its title was defective but in each instance the court held that the subject of the act is fairly expressed in the title, that the title is not such as will mislead or deceive, and that no more is required in a title than a fair summary of the contents of the act.

People vs. *General Petroleum Corp., supra;*
People vs. *Sterling Refining Co., supra.*

6. The Distribution of the Revenue Under the State Law.

It is alleged that no portion of the revenue derived under the act of 1923 or under the act of 1927 is paid over to the municipalities of the state, but neither in the complaint nor in appellants' brief is any reason suggested or authority cited to the effect that the state is without power to legally so provide.

The disposition of the revenue under those statutes is entirely a matter of legislative discretion. It was not necessary that any portion of the revenue be apportioned to the county. The state could have retained the entire revenue and could have devoted it to state highways exclusively. The state was under no legal compulsion to give one cent of that revenue to the county or to the municipality, but as a matter of equity and policy the legislature has prescribed that one-half of the revenue shall be turned over to

the counties to be expended by them in the construction and maintenance of "roads, bridges and culverts" in each county, which manifestly authorizes the expenditure of that revenue upon city streets. That is the situation under the act of 1923.

All moneys received under the act of 1927 pass into the State Highway Construction Fund. The constitution of California does not direct the legislature to apportion any part of such revenue directly to municipalities, hence there is no legal objection to the course which the legislature has taken with respect to either the 1923 or the 1927 act.

In a pending proceeding entitled

> *Carley & Hamilton, Inc.,* vs. *Frank G. Snook,* Chief of Division of Motor Vehicles, No. 2274-L, In Equity, in the District Court of the United States for the Northern District of California, Southern Division, (Not yet reported).

an attack was made upon section 77 of the California Vehicle Act, which is also the subject of controversy in the case of *Bekins Van Lines, Inc., et al.* vs. *Ray L. Riley,* as Controller of the State of California, No. 530 on the October, 1928, term of this court, on the ground that the weight fees collected by the state under that section were not directly apportioned to municipalities. The plaintiffs therein were represented by counsel in this proceeding and the court, consisting of Circuit Judge Rudkin and District Judges St. Sure and Louderback, in denying an

interlocutory injunction and granting the state's motion to dismiss, said in that regard:

> "The plaintiffs challenge the validity of those portions of the act imposing a tax or registration fee on the vehicles owned and operated by them within the corporate limits of the several municipalities of the state on the ground that the fee is in the nature of a toll for the use of the highways, and inasmuch as the plaintiffs make no use of the highways outside of the municipalities and are taxed for such use by the municipalities, the exaction by the state violates the Fourteenth Amendment to the Constitution of the United States. This broad contention cannot be sustained. In the lawful exercise of its acknowledged police power, the states may, beyond question, exact registration fees from owners and users of motor vehicles, varying with their horse power or weight, regardless of the extent or place of use, so long as the vehicles are or may be used on the public highways of the State." (Citing *Hendrick* vs. *Maryland,* 235 U. S. 610-22 and *Kane* vs. *New Jersey,* 242 U. S. 160-7.)

Injunction Relief Should Be Denied.

If the appellee should be enjoined from apportioning any money which it may now have and future collections under the acts of 1923 and 1927, all state highway construction and maintenance work will terminate abruptly, and the counties will be able to make no substantial progress in the construction and maintenance of public highways within the counties.

Millions of dollars of revenue, as appellants correctly allege, are in the balance so far as California's public highway program is concerned. The amount of money in which the appellants are interested as persons, who, it is claimed, have paid taxes, is not disclosed by the complaint. Of course it is inconsequential compared with the aggregate revenue derived by the state through the taxes imposed on distributors of motor vehicle fuel. Whatever may be the amount for which appellants claim reimbursement at the hands of the state, it is not alleged by them that the state will be unable to reimburse them, if that becomes necessary, out of moneys belonging to the state other than those represented by the proceeds of the 1923 and 1927 acts. Failure to make the allegation renders meaningless their assertion that they will suffer irreparable injury if the injunction prayed for be not granted.

It must be conceded that all of the public highways in the state are not and can not be federal aid highways, yet there is no allegation in the complaint attempting to segregate, even in a general way, those highways upon which no federal aid moneys have been or can be expended. It is plain that the taxing features of the acts of 1923 and 1927 will stand even though any one or all of the provisions of the statute attacked by the appellants be void, for they are separable provisions. It is equally plain that even though those acts be found contrary to the federal highway acts, they are valid and enforceable so far

as the public highways receiving no federal aid are concerned. That those acts do not contravene the fourteenth amendment of the federal constitution is definitely established. Therefore, the inability to allege that all of the public highways in the state are federal aid highways is a fatal omission so far as appellants' demand for an interlocutory injunction is concerned.

Appellants complain that appellee continues to pay out refunds, and it is asked that he be restrained from so doing. It has not been alleged by appellants that *they* have paid to the state any part of the moneys which it is alleged are being refunded by the state, or that they qualify for refunds under the terms of the state law. Refunds are payable under the terms of the state law only to those persons who have in fact paid the state tax *and* who have *not* used the motor vehicle fuel in propelling motor vehicles over the public highways of this state.

If the state laws are valid, tested by the state and federal constitutions, but are contrary to the terms of the federal acts, the remedy would seem to be to enjoin the payment of federal aid moneys to the state, but not to paralyze an extensive system of public highway construction and maintenance inaugurated long before federal aid was made available, comprehending a great number of highways which never have received and never will be able to receive federal aid, and which are quite as important to the federal government as to the State of California.

Wherefore, we submit that the decree of the court below denying injunctive relief and sustaining the motion to dismiss should be affirmed.

Respectfully.

U. S. WEBB,
Attorney General of the State
of California,
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Deputy Attorney General,
Attorneys for Appellee.

APPENDIX

MOTOR VEHICLE FUEL TAX LAWS.
TWO-CENT TAX ACT.

CHAPTER 267, STATUTES 1923.

An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes of two cents on the distribution of each gallon of such fuel.

[As amended by chapter 359, Statutes 1925, and chapter 716, Statutes 1927. There is an additional tax of one cent on the distribution of each gallon of such fuel, imposed by chapter 795, Statutes of 1927, *infra*.]

Definitions.

SECTION 1. The following words, terms and phrases shall whenever used in this act, have the meaning set forth in this section.

(*a*) "Motor vehicle" shall include every vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel.

(*b*) "Motor vehicle fuel" shall include all gasoline, distillate, benzine, naphtha, liberty fuel and other volatile and inflammable liquids produced or compounded for the purpose of, or which may be used in, operating or propelling motor vehicles except kerosene and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles.

(*c*) "Distributor" shall mean and include every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who

imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has been imported into this state, shall distribute or sell the same, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(*d*) "Service station" is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles.

Distributor's License.

SEC. 2. Every distributor shall within ten days after this act becomes effective and thereafter any person, firm, association or corporation before becoming a distributor shall register as such with the state board of equalization on forms to be prescribed, prepared and furnished by said board of equalization, and said state board of equalization shall issue to such distributor a license which shall be valid until revoked by said board as hereinafter provided.

Tax on Distributor.

SEC. 3. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and

sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling.

Tax, Lien of, When Due, and Penalty.

SEC. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license

tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p.m. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency.

Distributor's Record.

SEC. 5. Every distributor shall keep a record in such form as the state board of equalization shall require, showing the total number of gallons of motor vehicle fuel refined, manufactured, produced or compounded in this state and sold by such distributor within this state during each quarter; showing the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed by such distributor in this state during each quarter, whether in the original package or container in which the same was imported or otherwise than in such original package or container and the total number of gallons of such fuel acquired by such distributor in the original packages or containers in which the same was imported into this state and thereafter sold, distributed or used by him.

Distributor's Report. Tax Roll.

SEC. 6. Each distributor shall, within twenty days after the quarter ending December thirty-first, one thousand nine hundred twenty-three, and within twenty days after the end of each following quarter, file on forms to be prescribed, prepared and furnished by the state board of equalization, a verified statement showing the total number of gallons of motor vehicle fuel refined, manufactured or com-

pounded by such distributor within this state, and sold during such quarter by such distributor within this state; the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed within this state by such distributor during such quarter, when sold or distributed otherwise than in the original packages or containers in which imported into this state or used by such importer; also the number of gallons of such fuel acquired by him in the original package or container in which the same was imported into this state and thereafter sold, distributed or used by him; and such other information as the state board of equalization may require. The state board of equalization shall compute the license tax due or to become due hereunder, and extend the same upon a tax roll prepared and kept for the purpose, and on or before thirty days from and after the close of each quarterly period as herein defined, shall deliver said tax roll to the state controller, who shall give due notice of the dates when said taxes will become due.

What Constitutes Taxable Sale.

SEC. 7. All motor vehicle fuel distributed by any distributor to any of its service stations, or other agencies, tank trucks, wagons, boats, barges, or other facilities operated by such distributor in this state shall for the purposes of this act be considered in the same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold and delivered by such distributor; *provided,* that the amount of motor vehicle fuel distributed during any quarter to any such agency, tank truck, wagon, boat, barge, or other facility operated

by the distributor is hereby defined to mean the amount thereof thereafter found to have been sold and delivered therefrom during such quarter plus one-ninety-ninth thereof but excluding therefrom deliveries to service stations operated by such distributor.

All motor vehicle fuel used by a distributor in the operation of any motor vehicle shall for all the purposes of this act be considered in same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold by such distributor; *provided, however,* that in lieu of the collection and refund of the tax upon such fuel used for exempt purposes a credit may be given such distributor upon his tax return and assessment.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel.

Penalties Regarding Reports.

SEC. 8. It shall be unlawful for any distributor to fail, neglect or refuse to make and file any statement required by this act in the manner or within the time therein provided, or to make any such statement false in any particular.

Arbitrary Assessments.

SEC. 9. If any distributor shall fail, neglect or refuse to file the reports herein provided, the state board of equalization, immediately after such time has expired, shall proceed to inform itself as best it may regarding the matters and things required to be set forth in such statement, and, from such information as it is able to obtain, shall make a statement

showing such matters and things and shall determine and fix the amount of the license tax due to the state from such distributor for such quarter, and shall add to the amount of such license tax a penalty of twenty-five per cent thereof, and shall deliver such statement to the state controller who shall proceed to collect the amount of such license tax with the penalty added thereto, together with interest on the whole thereof at the rate of seven per cent per annum from the date upon which such statement should have been filed, and the distributor is thereafter estopped from complaining of the amount thereof.

Suits for Taxes.

Upon the request of the state controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued.

Nontaxable Sales.

SEC. 10. The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government but every distributor shall be required to report such exports

and sales to the state board of equalization in such detail as that board may require.

Tax Refund on Certain Sales.

SEC. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of California or export the same for use outside of this state; also any person, firm, association or corporation who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed and repaid the amount of such tax paid by him or it upon presenting to the state controller an affidavit accompanied by the original invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California. The said state controller, upon the presentation of such affidavits and such invoices or vouchers, shall cause to be paid to such consumer, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on the motor vehicle fuel so purchased or so used. All such applications shall be filed with the

state controller within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after such twelve months shall not be considered for any purpose by the state controller, the treasurer or the State of California.

Audit and Adjustment of Tax.

SEC. 12. The state board of equalization shall have the power and it is hereby authorized to make any and all such examinations of the records of distributors as it may deem necessary in carrying out the provisions of this act. If such examinations made by said board shall disclose that any reports of distributors of motor vehicle fuel theretofore filed with said board by said distributors, pursuant to the requirements of this act, have shown incorrectly the amount of gallonage of motor vehicle fuel distributed or the tax accruing thereon, said board shall have the power and is hereby authorized to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributors as hereinbefore authorized. The cost if any of such examination to be payable from the regular appropriation for clerical assistance of said board.

Distribution of Tax Proceeds.

SEC. 13. All money received by the state controller in payment of license taxes under the provisions of this act shall be by him deposited in the state treasury and credited to the "motor vehicle fuel fund," which fund is hereby created. One-half of all moneys remaining in said "motor vehicle fuel

fund" after the refunds herein provided for have been paid shall be paid therefrom to the counties of the state as hereinafter provided in the proportion which the number of vehicles registered in each of said counties bears to the total number of such vehicles registered in the state as determined by the places of residence of the owners to whom the registration certificates for such vehicles have been issued by the state during the current year, and it is hereby made the duty of the motor vehicle department to furnish to the state controller a record of the number of such registrations by counties. All such amounts so paid to the several counties shall be paid into a special road improvement fund. Such fund shall be expended by the county receiving it exclusively in the construction and maintenance of roads, bridges and culverts in each such county. In the event that any county has not established such a road fund, its proportion of such fund shall be retained by the state until provision for such a road fund has been made, and it shall then be paid over to such county.

In the months of May and November of each year, the treasurer shall make a report to the state controller setting forth the gross amounts received and the net receipts remaining after the payment of the refunds herein provided for for the preceding six months, and thereupon the controller shall draw his warrant upon the "motor vehicle fuel fund" in favor of each county in the state for the amount to which each such county is entitled. The controller shall not draw such warrant in favor of any county which shall not have established such a road fund as is herein required or which shall be delinquent in its

annual report to the state department of public works as hereinafter required.

Report of Supervisors.

The board of supervisors of each county shall make an annual report to the state department of public works not later than three months after the close of the county's fiscal year upon forms to be provided by such department, showing the amount of moneys received from the "motor vehicle fuel fund" during the preceding fiscal year and the disposition of said moneys, giving such details as to the disposition of said moneys as may be required by said department. Whenever such report shall not have been duly filed in the manner and form herein provided for at or before the time herein specified, the state controller shall not draw his warrant in favor of the treasurer of such county until said report has been filed.

Appropriation to Highway Maintenance Fund.

All moneys in the "motor vehicle fuel fund" other than those hereinbefore appropriated, are hereby appropriated to and shall by the state treasurer be paid into the "state highway maintenance fund," which fund is hereby created, and shall be used for the maintenance, repair, widening, resurfacing and reconstruction of the state highways, and for the maintenance, repair, widening, resurfacing and reconstruction of roads and highways in state parks, subject to the approval of the official or officials charged by law with the management and control of such parks, such moneys to be drawn from the state highway maintenance fund for the purpose of such maintenance, repair, widening, resurfacing and

reconstruction upon warrants drawn by the state controller upon demands made by the state highway commission and allowed and audited by the state board of control.

Penalties.

SEC. 14. Any person, firm, association or corporation or any officer or agent thereof failing to pay the tax as herein provided, or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this state declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

The state board of equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act.

Constitutionality.

SEC. 15. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Repeal of Conflicting Acts.

SEC. 16. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

In Effect, When.

SEC. 17. This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain act to be known and cited as the "California vehicle act" introduced in the forty-fifth session of the legislature as Senate Bill No. 743.

Procedure to Correct or Cancel Tax.

SEC. 18. All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provision of section three thousand six hundred sixty-nine of the Political Code.

ONE-CENT TAX ACT.

CHAPTER 795, STATUTES 1927.

An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes of one cent on the distribution of each gallon of such fuel.

Additional Tax on Distributor.

SECTION 1. In addition to the two cents license tax provided for in an act entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all

acts and parts of acts inconsistent herewith," approved May 30, 1923, as amended and approved May 23, 1925, and referred to herein as the "original act," every distributor, as defined in said "original act," shall pay a license tax to the state controller of this state of an additional one cent for each gallon of motor vehicle fuel, as defined in said "original act," said license tax to be computed, paid and collected in the same manner and at the same intervals of time as in said "original act" provided.

Refund of Tax. Appropriation for Highway Construction.

All moneys received by the state controller from payment of the additional license tax under the provisions of this act shall be by him deposited in the state treasury of this state and credited to the "Motor vehicle fuel fund" created in said "original act," and shall be subject to the payment of one-third of the refunds provided for in section eleven of said "original act" in the manner therein provided. After the payment of said proportion of said refunds, the balance of said moneys received hereunder shall be by the state controller credited to the "State highway construction fund," which fund is hereby created.

How Expended.

SEC. 2. All moneys so credited to said state highway construction fund shall be allocated and expended by the California highway commission of this state for the acquisition of rights of way for and the construction and improvement of state roads and highways in accordance with that certain act entitled, "An act to provide for the acquisition of rights of way for and the construction, maintenance

and improvement of state highways, classifying the highways in the state system and allocating and directing the expenditure of funds for the construction, maintenance and improvement of state highways," passed at the forty-seventh session of the Legislature or as subsequently amended, and in the event that said last mentioned act shall not be enacted into law at the forty-seventh session of the Legislature then and in that event the license tax of an additional one cent for each gallon of motor vehicle fuel imposed under this act shall cease and be inoperative. All money withdrawn from the state highway construction fund shall be upon warrants drawn by the state controller upon demands made by the said California highway commission and allowed and audited by the state board of control of this state.

Adoption of Provisions of Original Act.

SEC. 3. All provisions, penalties and requirements now contained in said "original act," not inconsistent herewith, are hereby adopted and made a part of this act, notwithstanding any repeal or amendment of said "original act," hereafter.

SECTION 2, ARTICLE XVI, CONSTITUTION OF CALIFORNIA.

Immediately upon the adoption of this section the state treasurer shall prepare forty thousand suitable bonds of the State of California in the demonination of one thousand dollars each, to be numbered from one to forty thousand, inclusive, to bear a date not later than thirty days after said adoption and to bear interest at the rate of four and one-half per cent per

annum from the date of said bonds, said interest to be payable on the third day of January and the third day of July of each and every year after the sale of said bonds, and said bonds to become due and payable in annual parcels of one thousand bonds, commencing July 3, 1926, and ending July 3, 1965.

The provisions of the act of the legislature approved May 20, 1915, known as the "state highways act of 1915," relative to the signing, countersigning, indorsing and sealing of the bonds therein provided for and the interest coupons thereon, the place and method of payment of principal and interest thereon, the procedure for initiating, advertising and holding sales thereof, and the performance by the several state boards and officers of their respective duties in connection therewith as therein stated, and all other provisions, terms and conditions in said last-named act relating to the bonds therein mentioned, so far as the same shall be pertinent, shall be applicable to the preparation, issuance and sale of the bonds herein provided for, as herein contemplated.

Funds corresponding to those provided for in said act are hereby created, and payments into and out of the same shall be made as in said act provided, said funds to be designated respectively, "third state highway fund," "third state highway interest and sinking fund," and "third state highway sinking fund"; and on the first day of July, 1926, and on the first day of July of each year thereafter, from the general fund to the "third state highway sinking fund," the required moneys as provided in section five of said act for the purposes therein stated but

as applicable only to the bonds herein provided for and the interest thereon.

The moneys in said "third state highway fund" shall be used by the state department of engineering for the acquisition of rights of way for and the acquisition, construction and improvement of uncompleted portions of the system of state highways prescribed by the act of the legislature approved May 22, 1909, known as the "state highways act," and the act of the legislature approved May 20, 1915, and known as the "state highways act of 1915," and certain extensions thereof described in said last-named act, and also for the acquisition of the rights of way for and the acquisition, construction and improvement of the following additional highways as state highways: Barstow to Needles; Oxnard to San Juan Capistrano; Barstow to Mojave; Santa Maria to Bakersfield; Skyline boulevard San Francisco to Santa Cruz; Rio Vista to Fairfield; Auburn to Verdi; Ukiah to Tahoe City; Crescent City to Oregon line; Santa Rose to Shellville; Big Pine to Oasis; Placerville to Sportsman's Hall; Feather river route Oroville to Quincy; General Grant National Park to Kings river canyon, Calistoga to Lower Lake; Mecca to Blythe; Rumsey to Lower Lake; Azusa to Pine Flats in San Gabriel canyon; La Canada via Arroyo Seco to Mount Wilson road; Lancaster to Bailey's; Bakersfield via Walker's pass to Freeman; McDonald's to the mouth of the Navarro river; Carmel to San Simeon; Klamath river state highway bridge to coast state highway; Susanville to Nevada state line; Pacheco pass road into Hollister; Visalia to Sequoia Park line; Deep creek easterly via Bear Valley dam to the county road at Metcalf Creek in the Angeles

national forest; Orland to Chico; Tiburon to Alto; and county line near Michigan Bar via Huot's ranch to Drytown. Said additional highways to be located on the most direct and practical routes; provided, however, that twenty million dollars of the moneys in said "third state highway fund," or so much of said twenty million dollars as shall be necessary, shall be used for the completion of all of the system of state highways contemplated and provided for in said "state highways act" and in said "state highways act of 1915," and the extensions thereof specified in said last-named act.

The cost of acquisition and construction of the several extensions described in said "state highways act of 1915" shall hereafter be entirely borne by the State of California, it being the intention hereof to relieve the several counties from any further cooperation as contemplated by said "state highways act of 1915," but nothing herein shall prevent any county from contributing towards the cost of said extensions or of any other state highways at its option to such extent as it may desire under the provisions of any existing laws.

All provisions of section eight of said "state highways act of 1915," and of any amendment thereof, and any provisions of said act or of any amendment thereof, relating to the selection of routes, character of construction of highways, manner of conducting work thereon, powers and duties of officers in connection therewith, adoption of public highways as state highways, payment of principal and interest on any bonds and appropriation of money for payment thereof, and the keeping of records and making of statements and reports, and all provisions of section

eight of the "state highways act," as amended May 19, 1915, and of section eight of the "state highways act of 1915," and of any amendment of either thereof, relating to the payment by counties of money for interest upon any bonds and the relief of counties from such payment, shall, so far as applicable, apply to the bonds herein authorized and all highways constructed hereunder.

All provisions of this section shall be self-executing and shall not require any legislative action in furtherance thereof, but this shall not prevent such legislative action; and all expenses that shall be incurred by the state treasurer in the preparation of bonds herein provided for and in the advertising and sale thereof and all expenses incurred by any officer in reference thereto shall be paid from the general fund of the state. Nothing in this constitution contained shall be a limitation upon the provisions of this section.

STATUTES OF CALIFORNIA, 1913, PAGE 461.

Section 1. The board of supervisors of any county may on a not less than four-fifths vote of such board or governing body, petition the state department of engineering, hereinafter in this act called department, upon forms prepared by said department, or under its direction to have any main public highway in the said county, or town improved and maintained under the provisions of this act. Such petition shall contain a detailed description of the highway petitioned to be improved, a statement as to whether or not the rights of way for the said highway have been secured by the public; a statement of the kind of construction work with which it is sought to have the

highway improved, and such other information and data as the department may prescribe.

Sec. 2. Upon receipt of such a petition the department shall give careful consideration to the matters contained therein, and may authorize the body filing the petition to file an amended or modified petition conforming to such regulations and conditions as in the discretion of the department may be deemed just and proper.

If said department determine that public necessity and convenience require that such highway should be laid out and be taken charge of by the state, it shall cause the engineer or surveyor of the county in which the road to be improved is located to make adequate surveys, plans, specifications and estimates thereof subject to the approval and acceptance of the department. Upon approval by the department, a copy of the petition, resolution or undertaking, plans, specifications and estimate shall be filed with the department and also in the office of the recorder of the county in which the highway is situated and thereafter it shall be a state highway, and shall be constructed and kept in good repair as the department shall direct, under the supervision of the engineer or surveyor of the said county, the expense for construction and repair of same to be proportioned and paid as hereafter provided. Such highways shall be known as state aid highways.

Sec. 3. The department shall not grant the prayer of any petition for the improvement of a highway under the provisions of this act unless all necessary bridges and culverts shall have first been constructed by the county, or town in which the highway is situated, in a manner satisfactory to the

department, nor unless all necessary rights of way have been secured by the public. All expenditures under the provisions of this act shall be distributed equitably throughout the state.

Sec. 4. When the department is prepared for construction it shall so notify the governing body of the town or county in which the highway is located and furnish them a verified copy of the approved plans and specifications and the said governing body shall proceed to advertise for bids and let the contract for construction in the manner provided for by the statutes for advertising and letting contracts for work on public highways by counties.

Should the bids for constructing the highways exceed the figure mutually agreed upon between the department and the county engineer as a reasonable compensation for the work the bids shall be rejected and the work be done as the department shall direct. In either case the county surveyor shall represent the department in the supervision of the construction. Whenever the department deems it necessary, it may appoint an inspector.

Sec. 5. Payment for the work shall be made by the local governing body in the manner provided by law for the payments of claims against the county for work of this class, on presentation of bills verified by the supervising engineer and approved by the department. The cost of construction shall include therein the cost of the surveys, drafting, engineering, inspection and other necessary expenses as well as the cost of the actual work of construction. Two-thirds of the cost of construction as shown by the bills approved by the department shall be paid by the county in which the highway is located and one-

third by the state. The cost of maintenance thereafter shall be equally divided between the state and the county, the work to be done as the department shall direct under the supervision of the county engineer. All bills for maintenance shall be approved and paid in the same manner as the cost of construction.

On the tenth of each month following the month in which work of any kind has been done, or expenses of any sort have been incurred in connection with the construction or maintenance of a state aid highway, the treasurer of the county where the highway is situated shall present to the department a verified statement of the amounts paid for work performed during the previous month and a demand for a payment of the amount due from the state. Upon verification and approval of this demand the state treasurer shall forward the amount to the county treasurer. The amount to be paid by a county may be paid out of the proceeds of a bond issue, the general fund, the general road district fund or out of the district funds of the road district in which the said highway is located.

The proportion of expense borne by the state shall be paid out of any fund now available, or which may hereafter be made available for the purpose, or out of special appropriations for the purpose made by the legislature.

Moneys shall be paid by the state treasurer upon warrants duly drawn by the controller of the state, upon demands made by the department and audited by the state board of control.

Sec. 6. The board of supervisors of any county may not, under the provisions of this act, petition

for the improvement of any highway the estimated cost of which by the county surveyor or engineer of said county shall exceed the sum of fifty thousand dollars, unless the same shall have been submitted to the electors of the county and approved. The board of supervisors is hereby authorized to issue bonds under the laws of this state for the construction of such highways and the approval of such bond issue by the electors shall authorize the board of supervisors to proceed with the construction of such highway under the provisions of this act.

Sec. 7. All of the provisions of law relating to state highways and to the department shall apply so far as they are applicable to all work done and to all methods employed under this act.

Sec. 8. This act shall be known and cited as the "State Aid Highway Act."

STATUTES OF CALIFORNIA, 1919, PAGE 138.

Section 1. The several counties, municipalities and road divisions of this state, within the limits of which may exist a state highway or highways under the jurisdiction and control of the state engineering department, are hereby empowered to do or order to be done on such highways any paving, curbing, street work or sewer work authorized by law; *provided, however,* that permission to do any such work shall first be obtained from the state department of engineering and all grades, elevations or curb lines sought to be established or pavement proposed to be constructed by any county, municipality or road division shall first be approved by said engineering department of the state; *and provided, further,* that in case any existing pavement should be injured as

a result of such work, such pavement shall be restored to the satisfaction of said engineering department.

STATUTES OF CALIFORNIA, 1923, PAGE 123.

SECTION 1. The board of supervisors of any county may by a four-fifths vote determine by resolution that the proposed improvement of a street or portion of street within an incorporated city is of general county interest and that county aid should be extended therefor. Such resolution must refer to the street or portion of street, the general nature of the improvement proposed and the nature of the aid to be furnished by the county and the fund from which it is to be paid.

Thereafter and in accordance with such resolution the county may give aid in one or more of the following ways; viz, it may contribute money, acquire material and deliver the same, furnish engineering services or labor, or loan its road-building machinery. The expense of such aid may be paid from the general fund, the general road fund or the fund composed of moneys received from the state pursuant to the vehicle act.

All moneys, materials and other aid so received by the city must be used by it in the improvement described in the resolution and any portion thereof not used shall be returned to the county.

SEC. 2. The board of supervisors of any county in the state may by resolution adopted by a four-fifths vote declare any highway in the county, whether lying in whole or in part within an incorporated city, to be a part of the county system of highways. A copy of such resolution shall be forwarded to the governing body of the municipality

within which the highway lies. Such governing body may consent to the establishment of such portion of such highway as lies within the limits of the city as a part of the county system of highways and upon the taking effect of an ordinance containing such consent such portion of such highway shall become and be a part of the county system of highways and shall thereafter be considered with respect to its construction, maintenance and repair a county highway and not a city street. Thereafter the board of supervisors of the county may improve such highway and maintain the same as other county highways are improved and maintained, and pay therefor out of the general fund, general road fund or fund composed of moneys received from the state pursuant to the terms of the vehicle act. *Provided, however,* that nothing herein contained shall be construed as limiting in any manner the police power of any municipality with reference to any such street or portion of street, improved under the provisions of this act.

SEC. 3. The board of supervisors of any county may at any time after all or a portion of a city street becomes a part of a county system of highways, as in this act provided, adopt a resolution declaring that such street or any portion thereof is no longer a part of such county system. Ten days after the filing of such resolution with the clerk of the city within which the street lies, such street, or the portion thereof described in the resolution, shall cease to be a part of the county system of highways.

SECTION 4041 OF THE POLITICAL CODE OF THE STATE OF CALIFORNIA.

The boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law:

4. To acquire and take by purchase, condemnation or otherwise land for the uses and purposes of public roads, highways, boulevards, turnpikes and other public ways, and to lay out, maintain, control, construct, repair, and manage public roads, boulevards, highways, turnpikes and other public ways, and to incur a bonded indebtedness for any such purposes; *provided,* that no such indebtedness shall be incurred for any of such purposes until after the question of the issue of bonds therefor shall have been submitted to the qualified electors of the county, at a special election called for that purpose, and two-thirds of the electors of the county voting at such election shall have voted in favor of issuing such bonds; said election to be called and held and said bonds, if authorized, to be issued, sold and made payable in the manner and form prescribed by section four thousand eighty-eight of this code. Said board shall also have power to make and enforce rules and regulations for the protection, management, control and use of such public boulevards, roads, highways, turnpikes and other public ways. Such boards shall also have power to expend from the general fund of the county such moneys as may be necessary to pay the whole or any part of the cost of the improvement of that portion of any street, highway, lane, alley, court, or other public place within any incorporated city of the

county, upon which abuts any real property of the county used for public purposes, not exceeding the amount, however, which, but for such public ownership and use, would be properly chargeable to and assessed against such real property under the provisions of the law governing such work or improvement; *provided,* no liability shall be created against the county in connection with any such work or improvement unless, prior to the commencement thereof, or to the letting of any contract therefor, the board shall, by resolution, determine and declare the amount to be so expended and direct that such sum be set apart and reserved out of any moneys in the general fund available for such purpose, to be used exclusively for paying the cost of such work or improvement.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 12

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
Appellants,

vs.

RAY S. RILEY, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.

W. R. CRAWFORD, and
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Solicitors for Appellants.

Parker Printing Company, 531 Clay Street, San Francisco

In the Supreme Court
OF THE
United States

October Term, 1928

No. 529

Geo. B. Williams, William J. Finn, M. L. Myers, et al.,
Appellants,

vs.

Ray S. Riley, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the appellants in the above entitled cause and ask this Honorable Court for a rehearing of the above entitled cause and for a vacation of its certain decree made and entered on November 25th, 1929, and show:

I.

Mr. Justice McReynolds delivered the opinion of the Court and stated:

> "The Appellants may not undertake to test the validity of the questioned Acts by a proceeding of this character."

The only citation was as follows:

> *Frothingham v. Mellon, Sec'y of the Treasury*, 262 U. S. 447.

We look to this case and find there were two cases consolidated by this Court, one the *Frothingham* case and the other the *Commonwealth of Massachusetts v. Mellon et al.*

> "The first of these cases was an original suit, brought in this Court by the Commonwealth of Massachusetts, for herself and as representative of her citizens, against the Secretary of the Treasury, the Chief of the Children's Bureau of the Department of Labor, the Surgeon General of the United States Public Health Service and the United States Commissioner of Immigration, all of whom were citizens of State other than Massachusetts and the last three of whom constituted the Board of Maternity and Infant Hygiene created by the above mentioned Act of Congress. The purpose was to enjoin the enforcement of the Act. The second case is an appeal from the decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District which discussed a bill brought by the Appellant, for the same purpose against the same defendants."

Mr. Justice Sutherland delivered the opinion of the Court and the following excerpt is found:

> "These cases were argued and will be considered and disposed of together. The first is an original suit

in this Court. The other was brought in the Supreme Court of the District of Columbia. That Court dismissed the bill and its decree was affirmed by the district court of appeals. Thereupon the case was brought here by appeal. Both cases challenge the constitutionality of the Act of November 23, 1921 (42 Stat. at L. 224, chap. 135, Comp. Stat. Sec. 9188½), commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several states as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in cooperation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the Federal Bureau. Whenever that Bureau shall determine that funds have not been properly expended in respect of any State, payments may be withheld.

It is asserted that these appropriations are for purposes not national, but local to the States, and, together with numerous similar appropriations, constitute an effective means of inducing the States to yield a portion of their sovereign rights. It is further alleged that the burden the appropriations provided by this act and similar legislation falls unequally upon the several states, and rests largely upon the industrial states, such as Massachusetts; that the act is an usurpation of power not granted to Congress by the Constitution,—an attempted exercise of the power of local self-government reserved to the States by the 10th Amendment; and that the defendants are proceeding to carry the act into operation. * * * In the Frothingham case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law."

Again:

"Probably it would be sufficient to point out that the powers of the State are not invaded, since the Statute imposes no obligation, but simply extends an option which the State is free to accept or reject. But we do not rest here. Under article 3, Sec. 2, of the Constitution the judicial power of this Court extends 'to controversies * * * between a state and citizens of another state', and the Court has original jurisdiction 'in all cases * * * in which a state shall be a party'. The effect of this is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside of the contemplation of the Constitutional grant. * * *"

Again: And Mr. Justice Thompson, with whom Mr. Justice Story concurred, in the course of an opinion, said:

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, the Courts of justice can interpose relief.

"This Court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation, upon the rights properly falling under judicial cognizance or a remedy is not to be had here." * * *

"It follows that insofar as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. * * *"

"Second. The attack upon the statute in the Frothingham case is, generally the same, but this plaintiff alleges, in addition, that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a Federal appropriation Act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. * * *"

"But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources —is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventative powers of a court of equity. * * *"

"The functions of Government under our system are apportioned. To the Legislative Department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised

is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department,—an authority which plainly we do not possess."

Your Honorable Court has already passed on another case from Florida.

Mr. Justice Sutherland in delivering the opinion said:

"The Act assailed was passed by Congress in pursuance of its powers to lay and collect taxes, and, following the decision of this Court in respect of the preceding Act of (September 8), 1916 (39 Stat. at L. 756, Chap. 463, Comp. Stat. Sec. 633a, Fed. Stat. Anno. Supp. 1918, p. 312) New York Trust Co. v. Eisner, 256 U. S. 345, 65 L. ed. 963, 16 A. L. R. 660, 41 Sup. Ct. Rep. 506) must be held to be constitutional. * * *"

"If the Act interferes with the exercise by the State of its full powers of taxation or has the effect

of removing property from its reach which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield."

Florida v. Mellon, 273 U. S. 12, 71 L. ed. 325.

Your Honorable Court has announced that no State can assail an Act of Congress in the same manner as attack was made on such Acts in the *Frothingham* and *Florida* cases, supra.

We cannot find any decision where the appellants cannot be protected in their rights granted by the Constitution of the United States or of any Act of Congress. Since the first case this Court has never refused to take cognizance of attacks made against State laws where the parties were entitled to protection against invasion of their constitutional rights as well as the Act of Congress. This Court had before it the question of the constitutionality of a law of New York vesting a monopoly on the waters of New York to vessels operating by steam. The Supreme Court decided that the State law was unconstitutional and the very condition that had arisen by reason of such different laws had been foreseen which led to the adoption of the Commerce Clause of the Constitution preventing such discriminatory legislation by adjoining States.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 63.

But the Supreme Court decided that it had no jurisdiction because the Constitution of the United States was attacked by the appellants. The present appellants do not attack any provisions of the Constitution of the United States or any Acts of Congress regarding Federal Aid Legislation, or the provisions of the Constitution of California, but instead relied upon these provisions of said Constitution and Acts in order to obtain the same privileges and protection as was created by Your Honorable Court in the *Gibbons* case.

In our brief and also in our reply brief, we set out decisions in a number of cases for the purpose of showing that we had the right to invoke the Constitution of the United States and Acts of Congress. We desire to call attention to the extract of Mr. Justice McReynolds in delivering the opinion in *Hendricks v. Maryland.* (See our brief p. 19.) In other words, this Court through Mr. Justice McReynolds held that a non-resident was not entitled to protection under the Commerce Clause, and on this point we desire to show the following extract from the brief of the Attorney General of Maryland in that case:

> "The States or their agents, municipal or private, may make and collect a charge for facilities rendered and such a charge is not a tax or burden on or interference with interstate commerce, although it may incidentally affect interstate commerce. In return for the additional facilities and improved conveniences provided, states are permitted to charge and collect reasonable compensation.
>
> As to toll charges for the use of improved navigable streams see Kellogg v. Union Co., 12 Connec-

ticut 7; Huse v. Glover, 119 U. S. 543, 548; Gloucester Ferry v. Pennsylvania, 114 U. S. 196, 214; Sands v. Manistee River, 123 U. S. 288; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333; Thames Bank v. Lovelle, 18 Connecticut 500.

As to bridges over navigable streams see Escanaba Co. v. Chicago, 107 U. S. 678, 683; The Bringhamton Bridge, 3 Wall. St.; Corrington Bridge Co. v. Kentucky, 154 U. S. 204, 221.

As to wharves or docks see Cannon v. New Orleans, 20 Wall. 577; Packet Co. v. Keokuk, 95 U. S. 80; Packet Co. v. St. Louis, 100 U. S. 423; Vicksburg v. Tobin, 100 U. S. 430; Packet Co. v. Catlesburg, 105 U. S. 559; Transportation Co. v. Parkesburg, 107 U. S. 691; Packet Co. v. Aiken, 121 U. S. 444; Huse v. Glover, 119 U. S. 543; Atl. & Pac. Tel. Co. v. Pennsylvania, 190 U. S. 160, 163.

As to the use of roads and streets see Tomlinson v. Indianapolis, 144 Indiana 142; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333; Cleary v. Johnston, 79 N. J. 49; Kane v. Titus, 81 N. J. L. 594.

A State is justified in requiring those who elect to use on its highways a mode of travel that is abnormally destructive to that road, to compensate it for such use.

Kane v. Titus, 81 N. J. L. 594"

As is seen, this Court passed on the questions there presented.

We see no reason why this Court has held that we have no right to invite the same decision as in the *Hendricks v. Maryland* case. Take the cases cited in our original brief showing that this Court has passed on attempts of the States to infringe on the Federal Constitution and Acts of Congress. For example, in the *Cumberland* case this Court held that these States could

not compel the mail contracts to pay "tolls" (see our brief, pages 32-33-34 and 35).

We call attention to the Act of Congress granting Telegraph Companies the right to construct, maintain and operate their lines on every post road in the State. The Act of Congress of July 24, 1866 has been enforced and the Telegraph Companies have been provided with a right which no State can take away (See *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708).

We desire to call the attention of this Court to the late case which shows that a license law in South Bend, Indiana which was taken up from the Supreme Court of Indiana to this Court. The Supreme Court of Indiana had interpreted the ordinance of the city. This Court followed the interpretation and under such interpretation your Honorable Court held that the license ordinance of the city was unconstitutional for various reasons. We consider that case and the instant one similar. Your Honorable Court did not declare that the *Sprout* case had no standing before this Court. This *Sprout* case was set out in the briefs in the case of *Carley & Hamilton, Inc. et al. v. Snook*, No. 86 of the October Term, 1929.

Sprout v. South Bend, 277 U. S. 163, 72 L. Ed. 529.

In the instant case the attack was made against the gas tax of California. The State Supreme Court has interpreted the gas tax and also the "California Vehicle Act" of 1923 (see brief of appellants, pages 12-13-14 and 15). Every dollar, as admitted, is paid in advance by

these appellants and said others and not a dollar is revenue obtained except from these appellants and said others as all said money is placed in a special fund known as the Motor Vehicle Fund as created by the State. It is admitted that the appellants and said others pay in advance the said three cent tax and that the distributors are simply tax gatherers and are not interested in any revenues, as said distributors take the three cents from all others. Distributors do not even distribute the refunds provided for by the Act, but the Appellee Riley pays same out of the money in said "Motor Vehicle Fund". These appellants, it is admitted, together with all persons, similarly interested or situated, are compelled to pay in advance the said three cent tax or they will be subject to heavy fines and imprisonment or both.

The whole purpose of this law is to receive compensation for wear and tear on the highways by motor vehicles only and this law is not a taxation proposition, but is an exaction directed upon the motor vehicles using the highways as was said by your Honorable Court in *Sands v. Manistee River Improvement Co.*, 193 U. S. 288 (see brief of appellants, page 17). In other words there is no connection which we can see between any of the facts in the instant case with those in the said *Frothingham* case.

II.

The Chief Justice, Mr. Justice Van Devanter and Mr. Justice Butler did not concur in the opinion.

In said dissent there is no citation or argument in support thereof. We are therefore not able to debate any questions in said dissent.

In Conclusion, we earnestly submit that if your Honorable Court sustain their decree for the reasons set out in the opinion, we believe that it would preclude the bringing of a class suit by a taxpayer relying on the 24th section of the Judicial Code and also the 14th clause thereof to attack a State statute as being in contravention to the Constitution or statutes of the United States.

We submit also that our brief sets out on pages 40 and 41 our position and the authorities that were cited in support of same and respectfully request that your Honorable Court find that appellants are entitled to the relief asked for in their Bill of Complaint.

W. R. Crawford, and
Edwin C. Ewing,
Solicitors for Appellants.

We certify that this Brief for Rehearing of the matters set out above are to the effect that it is presented in good faith and not for delay.

W. R. Crawford, and
Edwin C. Ewing,
Counsel for Appellants.

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In the Supreme Court
OF THE
United States

October Term, 1928

No. 5[redacted] 12

Geo. B. Williams, William J. Finn, M. L. Myers, et al.,
Appellants,

vs.

Ray S. Riley, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.
(Additional Citations)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 529

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
Appellants,
vs.
RAY S. RILEY, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.
(Additional Citations)

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We desire to cite some additional decisions.

The *Frothingham* case was an attack on the Federal Maternity Act of Congress. This Honorable Court held

that the Act was not a judicial question, but was a political one, and that there was no precedent to guide it to its decision in that case.

We would like to call attention to a few cases in addition to those already cited in petition for rehearing.

Mr. Justice McReynolds in delivering the opinion said:

> "What constitutes a cause of action arising 'under' the laws of the United States has often been pointed out by this Court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law."
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> *First Nat. Bank of Canton v. Williams*, 252 U. S. 504, 64 L. Ed. 690.

Mr. Justice Sutherland who rendered the opinion of the Court said:

> "This appeal brings here for consideration a challenge to the constitutionality of an act of the Pennsylvania legislature approved May 13, 1927, P. A. Stat. Supp. 1928, Sec. 9377a-1, 9377a-2, a copy of which will be found in the margin." • • •
>
> "It further appears that the State Attorney General and the District Attorney of the proper county have threatened and intend to and will prosecute appellant for its violation of the act, the penalties for which are severe and cumulative. Suit was brought to enjoin these officers from putting into effect their threats, upon the ground that the act in question contravenes the due process and equal protection

clauses of the 14th Amendment. It is clear from the pleadings and the record, and it is conceded, that if the act be unconstitutional as claimed, appellant is entitled to the relief prayed. Terrace v. Thompson, 263 U. S. 197, 215, 68 L. ed. 255, 274, 44 Sup. Ct. Rep. 15; Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764."

Liggett Company v. Baldridge, 278 U. S. 105, 73 L. ed. 204.

This Honorable Court had before it two appeals in which the Statutory Court had enjoined the State officials from enforcing a statute fixing the price of gasoline.

This Honorable Court affirmed the lower Court and Mr. Justice Sutherland delivered the opinion and cited many decisions including the case of *Frost v. Railroad Commission*, 271 U. S. 583.

Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287.

In a late case in which Mr. Justice Sutherland delivered the opinion of the Court:

"This is an action brought by the commonwealth of Kentucky against plaintiffs in error to recover an amount levied under Sec. 1, chap. 120, Acts of 1924, which imposes a tax of 3 cents per gallon on all gasoline sold within the commonwealth at wholesale. The words 'sold * * * at wholesale', as used in the act, are defined to include 'any and all sales made for the purpose of resale or distribution or for use,' and also to include any person who shall purchase such gasoline without the state 'and sell or distribute or use the same within the state.' The tax was increased from 3 cents to 5 cents a gallon by

Sec. 1, Chap. 169, Acts of 1926; and part of the amount sued for was computed at the latter rate.

Plaintiffs in error are engaged in operating a ferryboat on the Ohio River between Kentucky and Illinois. They do an exclusively interstate business. They are citizens and residents of Illinois. Their office and place of business and the situs of all their personal property is in that state. The motive power of the boat is created by the use of gasoline, all of which is purchased and delivered to plaintiffs in error in Illinois. It is stipulated that 75 per cent of this gasoline was actually consumed within the limits of Kentucky, but all of it in the making of interstate journeys. The tax in question was computed and imposed upon the use of the gasoline thus consumed."

This Honorable Court reversed the judgment of the Court of Appeals of Kentucky, and held the gasoline law was unconstitutional.

Helson v. Kentucky, 279 U. S. 245, 73 L. ed. 683.

Mr. Justice Van Devanter in delivering the opinion said:

"These are suits, one by the commonwealth of Pennsylvania and the other by the State of Ohio to enjoin the State of West Virginia from enforcing an act passed by her legislature (Acts 1919, Chap. 71) which the complainants believe will largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia into their territory and there sold and used for fuel and lighting purposes. Although distinct, the suits are so much alike that they have been presented at the bar substantially as a single case. They will be dealt with accordingly in this opinion.

The West Virginia Act is set forth at length in the margin. The complainants challenge its validity on the ground that it directly interferes with interstate commerce and therefore contravenes the commerce clause of the Constitution of the United States."

Pennsylvania v. West Virginia, 268 U. S. 553, 67 L. ed. 1117.

The decree announced by Mr. Justice Van Devanter is as follows:

"These suits having been heretofore submitted on the pleadings and the evidence, and the court being now fully advised in the premises,

It is considered, ordered, and decreed as follows:

1. That an act passed by the Legislature of the defendant state February 10, 1919, which is set forth in the bills of complaint in these suits and known as Chapter 71 of the West Virginia Acts of 1919, is a void and inoperative enactment because it contravenes the limitations which the Constitution of the United States places upon the State action in respect of commerce among the several states;

2. That the defendant State and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce the act;" (262 U. S. 623, 67 L. ed. 1143.)

Mr. Justice Brandeis in delivering the opinion said:

"Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways."

Buck v. Kuykendall, 276 U. S. 205, 69 L. ed. 623.

Mr. Justice Sutherland in delivering the opinion of the Court said:

> "We are of the opinion that the statute assailed contravenes the 14th Amendment and that the decree must be reversed."
>
> *Tyson & Bro. v. Banton*, 273 U. S. 418, 71 L. ed. 718.

Mr. Justice Stone in delivering the opinion said:

> "Plaintiff in error, a national banking association doing business in Wisconsin, brought suit in the circuit court of Washington County, Wisconsin, to recover from the defendant in error, the City of Hartford, a tax assessed and paid for the year 1921 upon shares of stock in plaintiff bank, on the ground that the assessment and tax were prohibited by Sec. 5219 of the Revised Statutes of the United States (Act of June 3, 1864, Chap. 106, 13 Stat. at L. 99, 112; Act of February 10, 1868, Chap. 7, 15 Stat. at L. 34, Comp. Stat. Sec. 9784, 6 Fed. Stat. Anno. 2d ed. p. 796). The tax having been paid under protest, a suit for its recovery, raising the legality of the assessment, is permitted by local statutes. Wis. Stat. 1923, Sec. 7473.
>
> The Trial Court held the assessment illegal and gave judgment for the plaintiff. On appeal the Supreme Court of Wisconsin reversed the judgment with a direction to the Court below to enter judgment in favor of the defendant, dismissing the complaint. 187 Wis. 290, 203 N. W. 721. The case comes here on writ of error under Sec. 237 of the Judicial Code. Merchants National Bank v. Richmond, 256 U. S. 635, 637, 65 L. ed. 1135, 1137, 41 Sup. Ct. Rep. 619; First National Bank vs. Anderson, 269 U. S. 341, 346, 70 L. ed. 295, 302, 46 Sup. Ct. Rep. 135.

The contention here is that the State supreme court erred in holding that these tax statutes are not repugnant to Sec. 5219, Revised Statutes."

Again:

"Finally it is said that Sec. 5129 is directed to an unfriendly discrimination or hostile attitude on the part of a state and that here the Wisconsin legislation was not dictated by such considerations, since the challenged exemptions were merely incidental to the adoption of a state policy of substituting, so far as possible, an income for a personal property tax. But a consideration for the entire course of judicial decision on this subject can leave no doubt that state legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are intended to be forbidden. The questions here considered arising from the application of an ad valorem tax are not affected by the amendment of Sec. 5219 by the Act of March 4, 1923, chap. 267, 42 Stat. at L. 1499, Comp. Stat. Sec. 9784, Fed. Stat. Anno. Supp. 1923, p. 84, which permits in lieu of the ad valorem tax on shares of national banks either a nondiscriminatory tax on the income of national banks or on the income derived from their shares. Judgment reversed."

First National Bank v. Hartford, ...U. S.....,
71 L. ed. 530.

We call attention of the Court to its decision in *Bekins Van Lines, Inc. v. Riley,* announced on November 25, 1929.

Mr. Justice McReynolds, in delivering the opinion, said:

"Appellants, as common carriers, are engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regu-

lar routes within California. The 1926 Amendment to the Constitution and the statutes of that State lay upon such carriers a tax of 5 per cent of their gross receipts in lieu of all other taxes, while other freight carriers, common and private, by motor vehicles, are subjected to different and, it is alleged, less burdensome taxation. Cal. Const. art. 13, Sec. 15; March 5, 1927, chap. 19, 1927 Cal. Stat.

By this proceeding instituted July 21st, 1928, appellants ask that the constitutional amendment and the statute which undertakes to lay such tax upon them be declared discriminatory and in conflict with Sec. 1 of the 14th Amendment; also that an injunction issue against the State Controller, forbidding him from attempting to enforce payment.

Upon motion without written opinion, the District Court—three judges sitting—dismissed the bill. The cause is here by direct appeal; and the only matter for our determination is the validity of the challenged classification.

The power of a state in respect of classification has often been declared by opinions here. We are unable to say that there was no unreasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed."

In the *Williams* case the appellants were not confined to Sec. 1 of the 14th Amendment, as they attacked the State law as also being contrary to the Constitution of the United States, the Federal Aid Legislation, and the Constitution of California.

W. R. Crawford,
Edwin C. Ewing,
Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 12—October Term, 1929.

Geo. B. Williams, et al., Appellants, *vs.* Ray L. Riley, as State Controller of California.	Appeal from the District Court of the United States for the Northern District of California.

[November 25, 1929.]

Mr. Justice McReynolds delivered the opinion of the Court.

By Acts approved July 11, 1916, Chap. 241, 39 Stat. 355, and Nov. 9, 1921, Chap. 119, 42 Stat. 212, Congress provided for aid to the states in road-making and directed "that all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds." California assented to the provisions of these acts and under them received large sums of money from the United States.

By the Motor Vehicle Fuel Tax Statutes, Chap. 267, Act 1923, Chap. 359, Act 1925, and Chaps. 716, 795, Act 1927, the California Legislature defined motor vehicle fuel and directed that all distributors of it should be licensed and pay taxes to the Controller of the State, amounting to three cents per gallon sold, less an allowance of one per centum. These statutes further provide for reimbursing purchasers of fuel not used for operating vehicles upon public highways.

Appellants, along with thousands of other citizens and taxpayers of California, operate motor vehicles along the highways. They have procured and must hereafter procure the necessary fuel from licensed distributors at prices enhanced by the amount of the three cent tax.

The original bill, filed in the District Court of the United States August 4, 1928, names as the only defendant the State Controller —the officer charged with the duty of enforcing the Motor Vehicle Fuel Tax Statutes. It proceeds upon the theory that those statutes under the form of taxing dealers from whom appellants and all

other operators of motor vehicles must buy in effect exact tolls for the use of the highways, also grant certain favors to the distributors, and deprive all such purchasers of their property without due process of law. Therefore, it is said, they conflict with the Fourteenth Amendment, the Federal Highway Acts, and the Constitution of California. The prayer is for a decree declaring their invalidity and for an injunction restraining defendant from attempting to enforce them, etc.

In the court below—three judges sitting—the bill was dismissed, without written opinion.

Appellants may not undertake to test the validity of the questioned acts by a proceeding of this character. *Frothingham* v. *Mellon, Sec'y of the Treasury,* 262 U. S. 447, 487, 488, announces the applicable doctrine.

> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern."

The Federal Courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the Federal or State constitutions. "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."

The decree below is affirmed.

The CHIEF JUSTICE, Mr. Justice VAN DEVANTER and Mr. Justice BUTLER are of opinion that the appellants' status is such as entitles them to test the validity of the California statutes in question; that these statutes do not exact tolls for the use of highways within the meaning of the limitation contained in the Federal Highway acts, and are not subject to the other objections urged against them; and that for these reasons the decree below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.